HEARINGS

BEFORE THE

JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS

CONGRESS OF THE UNITED STATES

NINETY-THIRD CONGRESS

FIRST SESSION

ON

THE LEGISLATIVE ROLE OF CONGRESS IN GATHERING AND DISCLOSING INFORMATION

THURSDAY, JULY 19, 1973

PART II

Roundtable Discussion

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JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS

CONGRESS OF THE UNITED STATES

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CONTENTS

JULY 19, 1973

APPENDIX

THE CONSTITUTIONAL IMMUNITY OF MEMBERS OF CONGRESS

THURSDAY, JULY 19, 1973

U.S. CONGRESS,
JOINT COMMITTEE ON CONGRESSIONAL OPERATIONS,
Washington, D.C.

The Joint Committee met, pursuant to notice, at 10 a.m., in room S-407, the Capitol, Hon. Lee Metcalf (chairman) presiding.

Present: Senator Metcalf, Senator Helms, Congressman Brooks (vice chairman), Congressman Cleveland and Congressman Giaimo.

ROUNDTABLE DISCUSSION

Participants

PROF. ALEXANDER M. BICKEL, YALE LAW SCHOOL, NEW HAVEN, CONN.
MARY C. LAWTON, ESQ., DEPUTY ASSISTANT ATTORNEY GENERAL, OFFICE OF LEGAL COUNSEL, DEPARTMENT OF JUSTICE
PROF. PHILIP B. KURLAND, UNIVERSITY OF CHICAGO LAW SCHOOL, CHICAGO, ILL.
MICHAEL VALDER, ESQ., COUNSEL FOR PLAINTIFFS-PETITIONERS, DOE V. McMILLAN, NO. 71-6356 (U.S. SUPREME COURT)

Representative BROOKS [presiding]. The Joint Committee on Congressional Operations is convened.

We meet this morning with a distinguished panel of witness-experts to conclude our inquiry into the constitutional immunity of Members of Congress with this roundtable discussion of issues raised by recent Supreme Court interpretations of the well-known Speech or Debate Clause of the Constitution.

Participating in this roundtable with the joint committee will be Ms. Mary Lawton, Prof. Philip Kurland, Mr. Mike Valder, and Prof. Alexander Bickel.

I regret that our very distinguished and able fellow Members, Congressman Sidney Yates and Congresswoman Edith Green, who had stopped by to hear a part of this discussion have had to leave. I want the record to show they were here and that they share our interest in this matter.

Ms. Mary Lawton is Deputy Assistant Attorney General in the Office of Legal Counsel at the Justice Department. She brings to this discussion valuable experience gained in the Justice Department, where she has been since her graduation from Georgetown Law Center.

Prof. Philip Kurland of the University of Chicago Law School is a well-known and respected constitutional lawyer. He serves as a consultant to Senator Ervin's Separation of Powers Judiciary Subcommittee and was a draftsman of the brief filed in the Supreme Court on behalf of the Senate in the *Gravel* case.

Mike Valder was until June of this year associated with the Urban Law Institute of Antioch College and served as a professor at the Antioch Law Center. Mr. Valder was counsel for petitioners in the case of *Doe* v. *McMillan*, handed down by the Supreme Court on May 29, in which he argued for accountability of congressional defendants for material included in a report of a congressional committee.

To introduce our fourth panelist, I yield to Congressman Giaimo.

Representative Giaimo. Mr. Chairman, it is a pleasure for me to introduce a gentleman who is very well-known—certainly in the Halls of Congress—and who really doesn't need any introduction. He has a very long and distinguished career at the Yale Law School and is the author of many great articles involving many of the critical concerns of the day. Prof. Alexander Bickel, of the Yale Law School, it is an honor to have you here.

Professor Bickel. Thank you.

Representative Brooks. We welcome our panelists.

I might say that the distinguished chairman of this committee, Senator Metcalf, was here earlier this morning and has gone over to the Senate for a 10:15 vote and is expected back shortly. We look forward to his return.

We have agreed to dispense with prepared statements by witnesses.

We would appreciate your candid views and your forthright responses to our questions as we conclude this inquiry into the constitutional immunity of individual legislators.

Before we open our discussion, Senator Taft has called to our attention to an article on "Legislative Privilege and the Separation of Powers," which appeared in the May 1973 edition of the Harvard Law Review. Copies of the article have been made available to each member of the committee. If there is no objection—in the absence of Senator Taft—I will include the article as part of the hearing record.

ARTICLE

LEGISLATIVE PRIVILEGE AND THE SEPARATION OF POWERS

by

ROBERT J. REINSTEIN
HARVEY A. SILVERGLATE

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HARVARD LAW REVIEW

LEGISLATIVE PRIVILEGE AND THE SEPARATION OF POWERS

Robert J. Reinstein * *and Harvey A. Silverglate* **

Professor Reinstein and Mr. Silverglate argue that the scope of the Constitution's speech or debate privilege, article I, section 6, must be defined historically, but not by static criteria derived from the clause's ancient judicial origins. After tracing the dynamic evolution of the privilege as a means of preserving legislative independence, they conclude that the clause's current scope must encompass all legitimate contemporary functions of a legislature in a system embracing a separation of powers. The authors argue that such a functional perspective requires that the privilege be interpreted broadly to prevent intrusions by the executive branch into such legislative activities as the publication of information for congressional colleagues and the public, the acquisition of information for such purposes, and the decisionmaking processes preparatory to such legislative functions, although not into legislative intervention before executive agencies. The functional independence of the legislative branch and the political neutrality of the judicial branch depend upon such a broad definition in executive-motivated suits. But the authors contend that such functional considerations indicate that the clause should be given a narrow scope in private civil suits brought against congressmen or congressional committees, especially those involving constitutional rights. Finally, because recent Supreme Court decisions have not afforded legislators adequate protection, the authors outline several legislative options by which Congress could preserve its independence in the system of separate powers.

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** Member, Massachusetts Bar; A.B., Princeton, 1964; J.D., Harvard, 1967.

The authors were counsel for Senator Gravel in his legislative privilege case, which is discussed extensively in this Article. We cannot overstate the contribution made to this Article by Charles L. Fishman, who was Senator Gravel's chief counsel. Mr. Fishman's ideas pervade this piece and by rights he should be listed as a co-author, but he declined because he did not participate in the actual writing. We of course absolve Mr. Fishman of all responsibility for the final product. The research assistance of Ralph Kates and Gerald McFadden is also gratefully acknowledged.

I. Introduction

ONLY 7 years ago, writing in *United States v. Johnson*,[1] the fourth case concerning the speech or debate clause [2] ever to reach the Supreme Court's docket,[3] Mr. Justice Harlan observed that "[i]n part because the tradition of legislative privilege is so well established in our polity, there is very little judicial illumination of this clause." [4] Yet since then, the Court has taken review of such cases five more times.[5] Three of these cases were argued last term alone; two — *Gravel v. United States* [6] and *United States v. Brewster* [7] resulted in landmark opinions, and one — *Doe v. McMillan* [8] — is still pending.

Last term's cases present a diverse array of factual situations, in which members of Congress invoked the clause as protection against alleged intrusions into the official actions of congressmen by the executive branch, private citizens, grand juries and the courts. The *Gravel* case is particularly important, since it involved a classic confrontation, nearly unprecedented in 200 years of American constitutional history, between avowedly separate and coequal branches of government. It arose out of the Justice Department's use of a Boston-based grand jury to interrogate Dr.

This Article is dedicated to the memory of our late teacher, Henry M. Hart, Jr.

[1] 383 U.S. 169 (1966).

[2] The speech or debate clause provides that

> for any Speech or Debate in either House, they [the Senators and Representatives] shall not be questioned in any other place.

U.S. Const. art. I, § 6.

[3] Prior to 1966, the Court had rendered decisions on the merits in only two cases involving the clause, Kilbourn v. Thompson, 103 U.S. 168 (1881) and Tenney v. Brandhove, 341 U.S. 367 (1951). The discussion in *Tenney*, although extensive, was technically dictum since the suit was brought against state legislators under the Civil Rights Act of 1871, *codified at* 42 U.S.C. § 1983 (1970), and the Court fashioned a common law privilege similar to the constitutional privilege for congressmen. In a third case, the court of appeals upheld a Senator's assertion of the privilege, and the Supreme Court declined to take review. Cochran v. Couzens, 42 F.2d 783 (D.C. Cir.), *cert. denied*, 282 U.S. 874 (1930). We exclude from this list another case which commentators occasionally refer to as involving the speech or debate clause, Long v. Ansell, 293 U.S. 76 (1934), because Senator Long's defense was premised entirely upon the distinct privilege from arrest. *See* p. 1123 & note 48, p. 1137 & note 128, p. 1139 & note 139 *infra*. In rejecting that defense as a bar against civil service of process, Justice Brandeis' opinion properly avoided mention of the speech or debate privilege.

[4] United States v. Johnson, 383 U.S. 169, 179 (1966).

[5] Dombrowski v. Eastland, 387 U.S. 82 (1967); Powell v. McCormack, 395 U.S. 486 (1969); United States v. Brewster, 408 U.S. 501 (1972); Gravel v. United States, 408 U.S. 606 (1972), *noted in The Supreme Court, 1971 Term*, 86 Harv. L. Rev. 50, 189 (1972); Doe v. McMillan, 459 F.2d 1304 (D.C. Cir.), *cert. granted*, 408 U.S. 922 (1972).

[6] 408 U.S. 606 (1972).

[7] 408 U.S. 501 (1972).

[8] 459 F.2d 1304 (D.C. Cir.), *cert. granted*, 408 U.S. 922 (1972).

Leonard Rodberg, an aide to Senator Mike Gravel (D., Alaska), concerning the Senator's conduct at an extraordinary meeting[9] of the Senate Subcommittee on Public Buildings and Grounds, which Senator Gravel headed. At that meeting, held on June 29, 1971, the Senator read aloud segments of a classified Defense Department study of the history of United States decisionmaking in Vietnam, popularly known as the "Pentagon Papers," and then placed into the record of the subcommittee hearing a large portion of that gargantuan study.[10] Aided by Dr. Rodberg, he then prepared the record for publication and engaged the Beacon Press of Boston to publish the entire manuscript, which Beacon did some months later.[11]

The Justice Department, utilizing the grand jury to investigate the subcommittee hearing, the preparation for it, and the subsequent release of the Senator Gravel edition of the Pentagon Papers, subpoenaed Dr. Rodberg.[12] Dr. Rodberg resisted, and Senator Gravel intervened with a motion to quash the subpoena. The district court preliminarily restrained enforcement

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[9] The meeting was held at midnight, but notice had been given to the members, and the meeting was apparently conducted according to the letter, although possibly not the spirit, of the Senate rules. *See* 118 CONG. REC. 4620 (daily ed. March 22, 1972).

[10] Another extraordinary feature of the meeting was that the Supreme Court had *sub judice* the case in which the executive had asked for an injunction against two newspapers to prevent the publication of portions of the "Pentagon Papers." *See* New York Times Co. v. United States, 403 U.S. 713 (1971). The Court's opinion in that case was delivered the next day, June 30.

Senator Gravel did not read, nor place into the record, four volumes of the Pentagon Papers dealing with unsuccessful negotiations to end the war in Vietnam. Reply Brief of Senator Gravel at 13–14 n.7, Gravel v. United States, 408 U.S. 606 (1972).

[11] THE SENATOR GRAVEL EDITION: THE PENTAGON PAPERS: THE DEFENSE DEPARTMENT HISTORY OF UNITED STATES DECISIONMAKING ON VIETNAM (1971). At about the same time, the Defense Department had the Government Printing Office publish a limited number of a censored edition at a price of $50. HOUSE COMM. ON ARMED SERVICES, 92D CONG., 1ST SESS., UNITED STATES-VIETNAM RELATIONS 1945–1967 (Comm. Print 1971). The more comprehensive Beacon edition was made available to the public in sufficient quantity at a price of $20.

[12] Both Dr. Rodberg and Senator Gravel alleged that the purpose of the subpoena of Rodberg was to investigate the Senator's actions with respect to the Pentagon Papers, rather than the actions of Dr. Daniel Ellsberg and Anthony Russo, who had already been indicted for their alleged conversion and distribution of the Papers. Record at 54, 70, Gravel v. United States, 408 U.S. 606 (1972). *See* United States v. Doe, 455 F.2d 1270 (1st Cir. 1972); United States v. Russo, Crim. No. 9373 (C.D. Cal., filed Dec. 29, 1972); United States v. Ellsberg, Crim. No. 8354 (C.D. Cal., filed June 28, 1972). The Justice Department did not deny this allegation, with which its legal arguments were consistent. The district court therefore accepted the allegation even though it had not required the Justice Department to specify the scope of the proposed inquiry. United States v. Doe, 332 F. Supp. 930, 932–34 & 933 n.3 (D. Mass. 1971).

of the subpoena, and ultimately rendered an opinion granting partial relief to the Senator.[13] Both sides appealed, and relief was altered by the Court of Appeals for the First Circuit in a somewhat abstruse opinion [14] that was clarified shortly thereafter.[15] The Supreme Court granted cross petitions for certiorari [16] and ultimately decided the issues essentially adversely to the Senator. [17]

Senator Gravel contended throughout the lengthy and complex proceedings that the speech or debate clause does not permit the executive or the judiciary to question members of Congress and their aides "in any other place" concerning their customary legislative activities, which had been defined by prior precedent to include all things "generally done in a session of the House by one of its members in relation to the business before it." [18] In

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[13] The court held that no witness before the grand jury could be questioned about the actions taken by Senator Gravel and his aides in preparing for and holding the subcommittee meeting, and a protective order was entered to that effect. United States v. Doe, 332 F. Supp. 930, 937–38 (D. Mass. 1971). The district court also held that the "republication" of the subcommittee record was not privileged and thus could be investigated by the grand jury and made the subject of a criminal indictment. *Id.* at 936–37.

Each court in this case used the technical term "republication" to describe the Beacon edition. Since this was the first and only publication of the subcommittee record — it was published neither in the official Senate Journal nor in the unofficial *Congressional Record* — we use the term "publication" in this Article.

[14] United States v. Doe, 455 F.2d 753 (1st Cir. 1972).

[15] Clarification came after a motion for rehearing and clarification. *Id.* at 762. The circuit court issued two protective orders. United States v. Doe, No. 71–1331 (1st Cir., Jan. 7, 1972); No. 71–1332 (1st Cir., Jan. 18, 1972). The latter reads as follows:

> (1) No witness before the grand jury currently investigating the release of the Pentagon Papers may be questioned about Senator Mike Gravel's conduct at a meeting of the Subcommittee on Public Buildings and Grounds on June 29, 1971, nor, if the questions are directed to the motives or purposes behind the Senator's conduct at that meeting, about any communications with him or with his aides regarding the activities of the Senator or his aides during the period of their employment, in preparation for and related to said meeting.
>
> (2) Dr. Leonard S. Rodberg may not be questioned about his own actions in the broadest sense, including observations and communications, oral or written, by or to him or coming to his attention while being interviewed for, or after having been engaged as a member of Senator Gravel's personal staff to the extent that they were in the course of his employment.

Gravel v. United States, 408 U.S. 606, 612–13 (1972), *quoting* Protective Order, United States v. Doe, No. 71–1332 (1st Cir., Jan. 18, 1972).

[16] Gravel v. United States and United States v. Gravel, 405 U.S. 916 (1972). On January 24, 1972, Mr. Justice Brennan had granted a stay of the court of appeals order pending the filing of a petition for certiorari. Brief of Senator Mike Gravel at 2, Gravel v. United States, 408 U.S. 606 (1972).

[17] *See* Gravel v. United States, 408 U.S. 606 (1972).

[18] Kilbourn v. Thompson, 103 U.S. 168, 204 (1881). Senator Gravel's assertion of privilege was supported by the United States Senate, which entered the case as amicus curiae. Senators Ervin (D., N.C.) and Saxbe (R., Ohio) argued orally for the Senate before the Supreme Court. This was the first time in recent memory

order to adequately protect legislators, Senator Gravel argued, the speech or debate privilege should not be defined literally: though the clause speaks only of legislators themselves, protection of their functions requires that the privilege extend to staff members who assist them.[19] When a subpoena to two printers followed the Rodberg subpoena,[20] Senator Gravel broadened his argument to seek protection for "third parties," that is, parties other than Senators and their immediate staff members and aides who assist a Senator in performing his functions. The Senator contended that to be effective in the case at hand, such protection had to encompass his acquisition of the papers, the preparation for and conduct of the subcommittee meeting, and the subsequent publication of the subcommittee record by Beacon Press.

The *Gravel* case, in short, presented the question of how wide a scope should be given to the definition of "legislative acts" — those activities performed by congressmen which are considered proper legislative functions, and thus entitled to the protection of the speech or debate clause. The answer to that question determines the extent to which the courts have jurisdiction to look into crimes allegedly committed by Senators, their aides, or "third parties" in the course of their activities. Put more in terms of separation of powers, the question is to what extent the speech or debate clause requires Congress alone to discipline its members accused of wayward conduct.[21]

The Supreme Court unanimously agreed that aides of congressmen must be treated as their alter egos for the purpose of the

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that the Senate had appeared before the Supreme Court as amicus curiae. The Senate Resolution authorizing that participation stated that "a decision in this case may impair the constitutional independence and prerogatives of every individual Senator, and of the Senate as a whole . . . ." S. Res. 280, 92d Cong., 2d Sess., 118 CONG. REC. 4735 (daily ed. March 23, 1972). As it turned out, the Senate's fears were well founded.

[19] Brief for Senator Gravel at 90–100, 109–126, Gravel v. United States, 408 U.S. 606 (1972).

[20] The first subpoena was addressed to Howard Webber, Director of M.I.T. Press. As with the Rodberg subpoena, Senator Gravel moved to intervene and quash the subpoena, alleging that the intended questioning would focus on the Senator's unsuccessful negotiations with Webber to publish the subcommittee record. Record at 17, Gravel v. United States, 408 U.S. 606 (1972). The Justice Department did not deny the allegation, and the district court allowed intervention and stayed operation of the subpoena pending appeal. *Id.* at 136–38. Four days after the court of appeals' decision, a subpoena was served upon Gobin Stair, Director of Beacon Press, which published the subcommittee record. The district court's stay order covered this subpoena and was continued by the court of appeals pending Supreme Court review. Amicus Brief of Unitarian Universalist Association at 2, Gravel v. United States, 408 U.S. 606 (1972).

[21] Congress is granted power to discipline its own members under U.S. CONST. art. I, § 5, cl. 2.

speech or debate clause, and agreed also that the clause should be applied in a subject-matter form: if a legislative activity were privileged, there could be no inquiry about it through the testimony of any witness.[22] However, a split Court held that the scope of activities protected by the clause is very narrow and does not include publication of the record or receipt of the material for use in committee.[23]

United States v. Brewster[24] involved the same central question as did *Gravel*, but in a far different factual setting. Former Senator Daniel B. Brewster (D., Md.) was indicted for accepting a bribe in exchange for his "being influenced in his performance of official acts in respect to his action, vote, and decision on postage rate legislation" and for soliciting funds "for and because of official acts performed by him."[25] The district court dismissed the indictment because it felt that the speech or debate clause "shields [Brewster] from any prosecution for alleged bribery to perform a legislative act,"[26] and the Justice Department had conceded that in order to secure a conviction it would have to introduce evidence concerning Senator Brewster's legislative activities.[27] The dismissal, in the district judge's view, was required by the Supreme Court's decision in *United States v. Johnson*[28] that the speech or debate clause prohibits extra-legislative inquiry into the motivations behind a congressman's speeches or votes. The Justice Department appealed directly to the Supreme Court,[29] which reversed, distinguishing *Johnson* and denying Brewster's plea of privilege.

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[22] Gravel v. United States, 408 U.S. 606, 616–22, 627–29 (1972); *id.* at 647 (Douglas, J., dissenting). *But cf. id.* at 628 n.17.

[23] *See* pp. 1153–57 *infra* for a discussion of this issue.

[24] 408 U.S. 501 (1972).

[25] *Id.* at 502–03. The facts of the *Brewster* case are detailed at pp. 1157–63 *infra*.

[26] *Id.* at 504. The district court's opinion was delivered orally on a motion to dismiss the indictment and is unreported. Record at 33, United States v. Brewster, 408 U.S. 501 (1972). In a colloquy with counsel the district court stated:

> [T]his Speech and Debate Clause wasn't just something that somebody stuck in this Constitution as an afterthought . . . . This matter of protecting legislators in what they did as legislators was a very important matter to the people who drafted our Constitution. It is a right you don't very often hear about, but for the functioning of a true Republic it is probably as important as the first ten Amendments put together.

Id. at 30. For a prior decision by the same judge (Hart) involving the speech or debate clause, see Powell v. McCormack, 266 F. Supp. 354 (D.D.C. 1967), *aff'd*, 395 F.2d 577 (D.C. Cir. 1968), *rev'd in part*, 395 U.S. 486 (1969).

[27] Record at 28, United States v. Brewster, 408 U.S. 501 (1972).

[28] 383 U.S. 169 (1966).

[29] The appeal was based on 18 U.S.C. § 3731 (Supp. V, 1970). *See* United States v. Brewster, 408 U.S. 501, 504–07 (1972). A 1971 amendment, which does not apply retroactively, no longer permits bypassing the court of appeals. Act of

Doe v. McMillan [30] reached the Supreme Court too late to be argued along with *Gravel* and *Brewster*, but certiorari was granted before the opinions in those two cases were rendered. *McMillan* arose out of an investigation by the House Committee on the District of Columbia into the problems of the District of Columbia school system. The committee's report discussed, in negative terms, the opinions and alleged activities of certain named students. When the committee was about to "republish" the report and distribute it publicly, these students sued the committee members, their aides and "third parties," including the Public Printer, to enjoin publication.[31] The plaintiffs asserted that the threatened publication would be an invasion of their constitutional right to privacy and an ill-disguised bill of attainder.[32] Congressman McMillan, represented by the Justice Department, asserted the speech or debate clause as a bar to the court's jurisdiction. The district court dismissed the complaint [33] and the court of appeals affirmed [34] without expressing any view on the merits, holding that the speech or debate clause and related common law privileges precluded it from considering the suit against any of the defendants.[35]

The positions taken by Senators Gravel and Brewster are arguably consistent with the recognition that the plaintiffs in *McMillan* should not be totally denied an opportunity to seek relief. The history of the speech or debate clause reveals that the privilege was not meant to apply broadly to suits brought by citizens to protect their civil rights from invasion by congressmen or congressional committees.[36] Rather, it was designed primarily to be invoked by congressmen in order to prevent executive intimidation and harassment.[37] However, the Justice Department

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Jan. 2, 1971, Pub. L. 91–644, Title III, § 14(a)(1), 84 Stat. 1890, *codified at* 18 U.S.C. § 3731 (Supp. 1972).

[30] 459 F.2d 1304 (D.C. Cir.), *cert. granted*, 408 U.S. 922 (1972).

[31] For obvious reasons, the plaintiffs sued anonymously.

[32] 459 F.2d 1304, 1308 (D.C. Cir.), *cert. granted*, 408 U.S. 922 (1972).

[33] *See id.* at 1308.

[34] *Id.* at 1309.

[35] *Id.* at 1314, 1316. Judge J. Skelly Wright dissented. *Id.* at 1319–29. In an earlier case, the district court had enjoined the Public Printer from publishing a House Internal Security Committee Report, which if published would have resulted in an abridgement of freedom of speech and association. Hentoff v. Ichord, 318 F. Supp. 1175 (D.D.C. 1970). However, that action had been dismissed against the congressmen-defendants and the committee's chief counsel, and normal publication in the *Congressional Record* was permitted. *Id.* at 1183.

[36] *See* pp. 1171–77 *infra*.

[37] *See* pp. 1122–33 *infra*. A less expansive position was taken in the amicus briefs submitted in Gravel v. United States, 408 U.S. 606 (1972), by the United States Senate, the American Civil Liberties Union and the Unitarian Universalist Association. These groups argued that a balance of competing social interests

took a rather different position, urging the Court to deny Senators Gravel and Brewster immunity from executive and judicial action while seeking to protect Representative McMillan from a charge of violating the rights of citizens.

With the *Gravel*, *Brewster* and *McMillan* cases before it, the Supreme Court had an opportunity to spell out the limits and uses of a clause which had not emerged in so many diverse contexts in 200 years of constitutional history. Involved were basic issues of separation of powers, executive dominance and congressional decline, the people's right to know, the ability of Congress to discipline itself free from hostile executive or judicial action, and the ability of citizens to protect their rights from invasion by congressional committees. An important provision of the Constitution, adopted at the Convention with almost no debate [38] and viewed as axiomatic for most of our history, has thus become the source of controversy and doubt. The purpose of this Article is to propose a general theory for the construction of the speech or debate clause. We begin this analysis with a detailed and admittedly revisionist examination of the development and historical purpose of the speech or debate privilege in both England and this country. We then examine the continuing viability of that purpose in our present form of government, and suggest how the general theory which we advocate should be applied to specific contemporary situations. Finally, because our conclusions differ from those of a majority of the Supreme Court in *Gravel* and *Brewster*, and because considerable and justifiable alarm has been expressed by constitutional scholars in Congress,[39] we end this Article with a discussion of several legislative remedies which may restore this essential constitutional provision to its proper role in our governmental system.

II. The Historical Development of the Privilege

The roots of the speech or debate clause, perhaps more than those of any other constitutional prohibition, can be traced directly to historical antecedents, to the bitter and prolonged dispute between Crown and Parliament which disrupted England

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requires that those who assist congressmen in the performance of their legislative tasks should be immune from judicial inquiry in executive-motivated suits though not in private civil suits, but that congressmen themselves should be immune from all forms of judicial review. Our resolution is somewhat different. *See* pp. 1171–77 *infra*.

[38] *See* pp. 1135–40 *infra*.

[39] *See, e.g.*, *The* Gravel *and* Brewster *Cases: An Assault on Congressional Independence*, 118 Cong. Rec. 13,610 (daily ed. Aug. 16, 1972) (speech of Senator Ervin).

for centuries. Even the language of our clause is taken almost verbatim from the English Bill of Rights of 1689.[40] Although the historical definition of the privilege is neither obvious nor uncontroversial, the particular historical view which one adopts is crucial to one's contemporary construction of the scope of the speech or debate clause. The traditional historical view perceives the privilege as static from an ancient inception, as unchanging over the several hundred years during which it has been recognized.[41] This approach defines the privilege according to its literal terms, insulating legislative debate from any form of outside interference and fostering a contemporary construction of the privilege which is in one sense narrow, and in another, expansive. In cases involving conflicts with the executive, the literal approach does not extend the reach of the privilege beyond legislative functions which are necessarily intertwined with speech or debate on the floor of Congress; the literal language of the speech or debate clause is thus construed to include voting, committee hearings, and legislative debate, but nothing more.[42] On the other hand, the traditional view does not distinguish the kinds of cases in which successful assertion of the privilege would frustrate its own historic objectives and would maintain the privilege with respect to civil suits.[43] A major thesis of this Article is that the literal theory of the privilege represents a fundamentally incorrect view of its history and leads to undesirable consequences for our system of government. The functional approach which we advocate views the privilege as evolving dynamically in response to changing governmental functions in order to fulfill the historic purpose of the privilege — the preservation of legislative independence in a system of separation of powers.[44] This approach

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[40] *See* pp. 1129–30 *infra*.

[41] This view is expressed in the leading American treatise dealing with the subject, C. WITTKE, THE HISTORY OF ENGLISH PARLIAMENTARY PRIVILEGE 23–32 (1970). *See also* 1 W. ANSON, LAW AND CUSTOM OF THE CONSTITUTION 159–60 (4th ed. 1909); F. MAITLAND, THE CONSTITUTIONAL HISTORY OF ENGLAND 241–43 (1926).

[42] *See* Gravel v. United States, 408 U.S. 606, 624–27 (1972); United States v. Brewster, 408 U.S. 501, 512–16 (1972).

[43] *See, e.g.*, United States v. Brewster, 408 U.S. 501, 516 (1972); Cochran v. Couzens, 42 F.2d 783 (D.C. Cir.), *cert. denied*, 282 U.S. 874 (1930).

[44] Our analysis builds upon the ground-breaking research of J.E. Neale, who has studied the development of the privilege during the Elizabethan era, which was a formative period in its history. *See* Neale, *The Commons' Privilege of Free Speech in Parliament*, in 2 HISTORICAL STUDIES OF THE ENGLISH PARLIAMENT 147–76 (E. Fryde & E. Miller ed. 1970). Neale's work was first published in 1924. Neale, *The Commons' Privilege of Free Speech in Parliament*, in TUDOR STUDIES 257–86 (R. Seton-Watson ed. 1924). It has had some impact upon the thinking of constitutional scholars in England. For example, the fourth edition of Taswell-Langmead's classic work, which is the last edition to retain his original text, sets

broadly defines the sphere of contemporary legislative functions protected by the speech or debate clause in executive-legislative conflicts, and it circumscribes the degree to which the privilege may preclude judicial review in certain private civil cases.

A. The Evolution of the Privilege in England

As first conceived in England, the free speech privilege afforded no protection to legislators against the actions of a hostile monarch. Parliament's privileges originated in the fourteenth and fifteenth centuries out of a conception of Parliament as a *judicial* body, the highest court of the land, and a concomitant assertion that lower courts could not entertain actions challenging the propriety of deliberations in a higher court.[45] In addition to freedom of speech, a number of other privileges were claimed, including freedom from civil arrest and the right to punish members and outsiders for contempt, rights which also derived from judicial antecedents.[46] Given this judicial origin, the initial scope of the free speech privilege was necessarily limited to protecting the speeches and debates of members of Parliament from the interference of private persons through the courts.[47] The judicial

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forth the traditional historical view, T.P. Taswell-Langmead, English Constitutional Law 284–85, 300–05 (4th ed. 1898) [hereinafter cited as Taswell-Langmead (4th ed.)], while the most recent edition, edited by Plucknett, adopts Neale's approach. T. Plucknett, Taswell-Langmead's English Constitutional History from the Teutonic Conquest to the Present Time 245–51 (11th ed. 1960) [hereinafter cited as Taswell-Langmead (11th ed.)].

[45] *See generally* C. McIlwain, The High Court of Parliament and Its Supremacy: An Historical Essay on the Boundaries Between Legislation and Adjudication in England 229–46 (1910); Neale, *The Commons' Privilege of Free Speech in Parliament*, in 2 Historical Studies of the English Parliament 147–76 (E. Fryde & E. Miller ed. 1970); Cella, *The Doctrine of Legislative Privilege of Freedom of Speech and Debate: Its Past, Present and Future as a Bar to Criminal Prosecutions in the Courts*, 2 Suffolk L. Rev. 1, 3–5 (1968). For the early origins of one privilege, see note 48 *infra*.

[46] *See generally* C. Wittke, The History of English Parliamentary Privilege (1921). The privilege against arrest was first codified in a statute of Henry IV, which provided that members of Parliament and their servants were immune from arrest during session and shortly before and after. *See* D. Barrington, Observations on the More Ancient Statutes 372 (4th ed. 1775). But this privilege never applied to actions instituted by the Crown: "treason, felony and surety of the peace" cases. T. May, Treatise on the Law, Privileges, Proceedings and Usage of Parliament 90, 100–01 (B. Cocks ed. 1971).

[47] *Strode's Case*, discussed in Taswell-Langmead (11th ed.) at 247–49, is an excellent illustration of the original meaning of the privilege. In 1512, a private complaint was filed against Richard Strode, a burgess of Parliament, because he had voted in favor of a bill controlling abuses against tin miners. He was convicted and imprisoned by a local court, and when he petitioned Parliament for a remedy, a special bill was passed setting him free. 4 Henry VIII, c. 8 (1512). As Neale points out, this case

> has no concern with the relations of the crown and the commons. The act

privilege was a corollary of sovereign immunity: the personal delegates of the King were answerable only to him for their official conduct.[48] Although this somewhat narrow scope of the privilege was to plague Parliament during subsequent confrontations with the Crown, no claim was made by Parliament, even through the early 1500's, that the King was obliged by law, custom, or history to refrain from interfering with its deliberations. It was not until 1542, a century and a half after the privilege was first conceived, that freedom of speech or debate was first recorded as an asserted right in the Speaker's Petition, which defined, albeit vaguely, the relations of Parliament and the Crown.[49]

The free speech privilege evolved gradually and painfully into a practical instrument for security against the executive, an evolution triggered by basic changes in the functions of the legislature.[50] As the powers of the king's council decayed in the

concerning him asserts the obvious principle that an inferior court cannot punish members of a superior court for their actions in that court.

Neale, *supra* note 44, at 160 n.45. *See also* McIlwain, *supra* note 45, at 219–22. More than 150 years later, when the Commons' functions had conflicted with the Crown's prerogatives and Parliamentary independence was established, this Act was declared to be a general act, applicable to the Crown as well as private parties. *See* note 70 *infra*.

[48] *See, e.g.*, Floyd & Barker, 77 Eng. Rep. 1305, 1307 (Star Chamber 1608); *cf.* Randall v. Brigham 74 U.S. (7 Wall.) 523, 539 (1868). *See also* 5 W. Holdsworth, History of English Law 159–60 (2d ed. 1937). The privilege of freedom from arrest, which appears to be the earliest recorded privilege, originated in royal proclamations stating that all members going to or from Parliament were under the prescriptive protection of the King, who summoned them. In 1290, Edward I decreed that distraints against members of the King's council in time of Parliament were forbidden; and in 1314 Edward II issued writs to stay all actions by assize against members of either house during a session. The first instance in which a breach of this privilege was remedied occurred in 1315, when the Prior of Malton was placed under civil arrest while returning from Parliament. The King declared the arrest to be an act done in contempt of the Crown and gave the prior a right to damages. *See* J. Jolliffe, Constitutional History of Medieval England 452–53 (4th ed. 1961); 3 W. Stubbs, Constitutional History of England 512–14 (4th ed. 1946).

[49] Neale, *supra* note 44, at 157.

[50] This expansion of the scope of Parliament's speech or debate privilege must be attributed to the assumption of legislative prerogatives by the House of Commons. The House of Lords was created as a judicial body and remains the highest appellate court in England. The House of Commons originally assumed the quasi-judicial function of acting upon private petitions and thus shared with Lords the judicially defined speech or debate privilege. *See* McIlwain, *supra* note 45, at 202–05; Neale, *supra* note 44, at 151–52. But Commons gradually expanded its prerogatives, and with them the scope of Parliament's speech or debate privilege. *See* pp. 1124–35 *infra*. Although most of the controversies surrounding the privilege concerned the prerogatives of Commons, sympathetic dissidents in the House of Lords also bore the brunt of Royal displeasure. On one occasion, Charles I (1625–1649) forbade the Earl of Arundel to attend Parliament. *See* 6 S. Gardiner,

late fifteenth and early sixteenth centuries, the House of Commons asserted growing authority over bills submitted by the Crown and sought to construct a shield against the King's oft-expressed displeasure.[51] It was "out of this need for unrestrained criticism of government measures" that the House attempted to transform the free speech privilege into a guarantor enforcing a nascent system of separation of powers.[52] The privilege was therefore formalized into the Speaker's Petition in 1542,[53] and the first comprehensive definition of the expanded version of the privilege was articulated by a courageous and harassed member, Peter Wentworth, in 1575.[54] But the Crown, emphasizing

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History of England from the Accession of James I to the Outbreak of the Civil War 91–94 (1965); Taswell-Langmead (11th ed.) at 364–65. But despite such opportunities for members of Lords to assert their privileges against the King, we could find no occasion upon which they did so. Nevertheless, when Commons asserted the speech or debate privilege, it did so on behalf of all of Parliament, and the expanded privilege must apply to Lords as well as Commons.

[51] Neale, *supra* note 44, at 163–64. When Parliament's initiative was by petition, there was no real threat to the wide powers of the Crown, since the petition was only a request for a remedy and the King's response became the statute. Of course, the King could and often did qualify the sense of the petition in his reply and thereby mold the statute. However, when the bill procedure was introduced, the King's power of modification was eliminated, and he could only assent to or veto the bill. *Id.* at 170–72. The bill was thus the actual text of law, enforceable in the courts, and the veto was an unreliable weapon. Elizabeth tried, therefore, to reinstitute the old petition procedure, but did not succeed. However, the House needed protection against more direct interference with their debates. *Id.* at 170–72. Thus, the speech or debate privilege did not arise independently of the change in Parliament's functions, but as a result of it.

[52] *Id.* at 163–64.

[53] *Id.* at 157; *see* note 58 *infra*.

[54] Wentworth began his remarkable speech by complaining that in the last session of Parliament, "I saw the Liberty of free Speech, the which is the only Salve to heal all the Sores of this Common-wealth, so much and so many ways infringed." S. D'Ewes, Journal of all the Parliaments During the Reign of Queen Elizabeth 236 (1682). Free speech was insecure, he said, as long as the House heeded the Crown's commands to cease discussion into matters involving its prerogatives. *Id.* at 236–37. He then asserted the absolute and exclusive right of the House to control the parameters of debate:

> . . . The King ought not to be under man, but under God and under the Law, because the Law maketh him a King . . . [and] free Speech and Conscience in this place are granted by a special Law, as that without which the Prince or State cannot be preserved or maintained . . .
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> . . . it is a dangerous thing in a Prince to oppose or bend herself against her Nobility and People . . . And how could any Prince more unkindly intreat, abuse, oppose herself against her Nobility and People, than her Majesty did the last Parliament? . . . is it not all one thing to say, Sirs, you shall deal in such matters only, as to say, you shall not deal in such matters? and so as good to have Fools and Flatterers in the House, as men of Wisdom . . . It is a great and special part of our duty and office, Mr. Speaker, to maintain the freedom of Consultation and Speech, for by this, good Laws . . . are made . . . for we are incorporated into this place, to serve God and all England, and not to be Time-Servers . . . or as Flatterers that would fain beguile all the World . . . [b]ut let us show our-

the "judicial" theory of the privilege, vehemently denied that it was bound by such a transformation,[55] and through the reigns of Henry VIII [56] and Elizabeth I [57] the privilege afforded no real protection for "licentious" discussions of matters involving the prerogatives of the Crown.[58]

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selves a People endured with Faith . . . that bringeth forth good Works . . . Therefore I would have none spared or forborn that shall from henceforth offend herein, of what calling soever he be, for the higher place he hath the more harm he may do . . .

Id. at 238–40. Immediately following this audacious speech Wentworth was placed under arrest, interrogated, and imprisoned for 1 month. *Id.* at 241–46. The persecution of Wentworth, and his elaborate defense on the grounds of privilege, are described by Cella, *supra* note 45, at 8–9.

[55] *See* S. D'EWES, JOURNAL OF ALL THE PARLIAMENT DURING THE REIGN OF QUEEN ELIZABETH 175–76, 259, 269, 284, 410–11, 478–79 (1682).

[56] 1509–47.

[57] 1558–1603.

[58] *See* 4 HOLDSWORTH, *supra* note 48, at 89–93; Neale, *supra* note 44, at 159–60, 164–65. Analysis of the development of freedom of speech and debate is made difficult by the fact that during subsequent confrontations with the Crown, Parliament was to argue that the privilege had been understood from ancient times to bar intrusions by the Crown. *See, e.g.*, *Protestation of December 18, 1621*, in TASWELL-LANGMEAD (11th ed.) 357–58; argument of counsel in Proceedings against Sir John Eliot, Denzil Hollis and Benjamin Valentine, 3 How. St. Tr. 294, 295–97, 302–04 (1629). But the only two pieces of evidence ordinarily advanced in support of this proposition do not withstand analysis:

(a) Some historians and judges have cited *Haxey's Case* in 1399 (unreported) as an early assertion of the privilege against the Crown. *See, e.g.*, MAITLAND, *supra* note 41, at 241–42; WITTKE, *supra* note 46, at 23–24; Veeder, *Absolute Immunity in Defamation: Legislative and Executive Proceedings*, 10 COLUM. L. REV. 131, 132 (1910); *cf.* Barr v. Matteo, 360 U.S. 564, 578, 579 n.2 (1959) (Warren, C.J., dissenting). Haxey was a clerical proctor serving as keeper of the rolls in the Court of Common Pleas. He introduced a private bill to reduce the expenditures of the royal household, for which he was tried and convicted of treason. In the first year of Henry IV, he successfully petitioned the King in Parliament for a reversal of this judgment as being "encontre droit et la course quel avoit use devant en Parliament en anientisement des custumes de lez communes." *See* TASWELL-LANGMEAD (11th ed.) 174–75, *citing* 3 Rot. Parl. 434 n.104. But Neale has shown that the petition did not represent a claim of parliamentary privilege, but was grounded either upon procedural irregularities in the trial or upon the contention that Haxey's offense did not amount to treason. Neale, *supra* note 44, at 149; *see also* TASWELL-LANGMEAD (11th ed.) 174–75. If *Haxey's Case* did deal with the speech or debate privilege, it would be very difficult to explain why this privilege was not asserted in the Speaker's Petition until a century and a half later.

(b) In its battles with Charles I (1625–1649), Parliament was to argue that the act in *Strode's Case*, *supra* note 47, was *originally* intended to be an absolute prohibition against any prosecution of members for speeches in Parliament. *See* Proceedings against Sir John Eliot, Denzil Hollis, and Benjamin Valentine, 3 How. St. Tr. 294, 297 (1629). Some historians seem to agree, *see, e.g.*, WITTKE, supra note 46, at 25–30; *cf.* United States v. Johnson, 383 U.S. 169, 182 n.13 (1966). But there is evidence which points the other way. In 1523, only 11 years after *Strode's Case*, and in the midst of one of the first of a series of major conflicts between Parliament and the Crown, Sir Thomas More, Speaker of the House

The increasing independence and legislative authority of the House of Commons was a powerful force, and increasing legislative cognizance was taken of matters once thought to be within the Crown's exclusive domain, such as the conduct of foreign policy and the succession. The House began to conceive of itself seriously as Grand Inquest of the Nation, demanding "a voice in the general policy of the country, and [the right] to criticize the action of the executive in modern fashion." [59] The consequent intrusions into the Crown's prerogatives led to a century-long battle [60] over Parliament's freedom of speech or debate, with the Tudor and Stuart monarchs claiming the inherent sovereign right to defend their prerogatives by interfering in Commons' debates and punishing members for "seditious" and "licentious" speech. If the privilege was to serve as an effective instrument of security for Parliament, a broader and more absolute definition, which would protect those speeches concerning matters within the House's expanded jurisdiction, was essential.[61]

This dispute over the scope of the privilege was characterized

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of Commons, begged Henry VIII to show tolerance towards displeasing opinions expressed during the course of debate:

> [T]he wisest man and best spoken in a country happens on occasion while his mind is fervent on a matter, to speak in such wise as he would afterward wish not to have done, and would so gladly change: therefore, most gracious Sovereign, considering that in all your high Courts of Parliament there is nothing treated but matters of weight and importance concerning your realm, and your own royal estate, it could not fail to hinder and put to silence from giving their advice many of your discreet Commons, unless they were utterly relieved of all doubt and fear how anything they should happen to speak should by your Highness be taken: and on this point your well-known benignity puts every man in right good hope.
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> . . . . It may therefore please your most abundant Grace, our most gracious King, to give to all your Commons here assembled, your most gracious licence and pardon freely, without doubt of your dreadful displeasure, for every man to discharge his conscience, and boldly in everything incident among them to declare his advice; and whatsoever any man happens to say, it may please your noble Majesty . . . .

ROPER'S LIFE OF MORE, IN THE UTOPIA OF SIR THOMAS MORE 218–19 (Campbell ed. 1947). There is nothing in this language which suggests that More, or the burgesses for whom he was speaking, regarded freedom of speech and debate as a claim of natural inheritance which must be honored by the Crown. *See also* note 71 *infra*.

[59] 1 W. ANSON, THE LAW AND CUSTOM OF THE CONSTITUTION 35 (5th ed. 1922) *See also* MCILWAIN, *supra* note 45, at 173–89.

[60] Roughly, 1575–1688.

[61] *See* ANSON, *supra* note 59, at 160–161:

> The line taken by the Tudor and Stuart sovereigns on this question of freedom of speech shows that the House had to struggle not merely for latitude of discussion, but for the existence of its initiative in legislation and in deliberation. The Crown maintained and the House denied that the Commons were summoned merely to vote such sums as were asked of them, to formulate or to approve legislation or topics of legislation submitted to them, and to give an opinion on matters of policy if, and only if, they were asked for one.

See also 4 HOLDSWORTH, *supra* note 48, at 178.

by systematic harassment of members who dared criticize the Crown — the King claiming that the privilege ended where his prerogatives began and the House declaring that the privilege was absolute for any matter touching parliamentary business.[62] The methods of intimidation employed by the Crown and objected to by Parliament as a breach of privilege took a wide variety of forms. The Crown's arsenal included the practices of issuing direct orders to the Speaker to cease debate on sensitive topics, spreading rumors of royal displeasure and threats of retaliation, bribing corruptible members of Parliament, summarily arresting others and arraigning them before the Star Chamber and other secret, inquisitorial bodies, or committing them directly to the Tower of London.[63] Apparently out of a need to legitimize its position in the face of increasing popular displeasure, the Crown turned to the courts for both assistance and vindication. The battle culminated when Sir John Eliot and other members of Commons, who opposed funding what they considered to be a needless and bloody war against France, were prosecuted in 1629 for making "seditious" speeches in the House.[64] The judges of the King's Bench agreed with the Crown that the judicial foundation of freedom of speech or debate precluded "seditious" speeches from its scope, and therefore rejected Eliot's plea of privilege.[65] He was convicted for seditious libel and ordered

[62] *See* 4 HOLDSWORTH, *supra* note 48, at 89–93; Neale, *supra* note 44, at 159–60, 164–65.

[63] *See generally* TASWELL-LANGMEAD (11th ed.) 174–76, 194–96, 312–16, 353–79.

[64] *Id.* at 362–65, 375–78.

[65] Proceedings Against Sir John Elliot, Denzil Hollis and Benjamin Valentine, 3 How. St. Tr. 294 (1809) (*Eliot's Case* was decided in 1629). It is noteworthy that Eliot's counsel based his plea against the court's taking jurisdiction on a functional perspective, arguing that the privilege applied even to speeches characterized as "seditious" because of the accusatory and inquiring function of Parliament:

> The words [of the speech] themselves contain several accusations of great men; and the liberty and accusation hath always been parliamentary . . . . So it is the duty of the commons to enquire of the Grievances of the Subjects, and the causes thereof, and doing it in a legal manner . . . [and] parliamentary accusation, which is our matter, is not forbidden by any law.

Id. at 295–96. He also relied on the judicial origins of the privilege:

> Words spoken in parliament, which is a superior court, cannot be questioned in this court, which is inferior.

Id. at 296. In rejecting the plea, the judges addressed themselves *only* to the latter proposition. Justice Whitlocke said:

> [W]hen a burgess of parliament becomes mutinous, he shall not have the privilege of parliament. In my opinion, the realm cannot consist without parliaments, but the behaviour of parliament-men ought to parliamentary. No outrageous speeches were ever used against a great minister of state in parliament which have not been punished. If a judge of this court utter scandalous speeches to the state, he may be questioned for them before commissioners of Oyer and Terminer, because this is no judicial act of the court.

Id. at 308. And Chief Justice Hyde added:

> As to what was said, That an inferior court cannot meddle with matters

imprisoned "during the king's pleasure." [66]

The conviction and imprisonment of Eliot and others crystallized opposition to the dictatorial rule of Charles I and was a significant factor leading to the Civil War and the execution of the King.[67] In 1641, with the beginning of the Long Parliament and a full century after Commons had taken the first tentative step of incorporating the privilege into the Speaker's Petition, the House declared Eliot's trial to be an illegal infringement of speech and debate.[68] There followed a series of resolutions and acts by both Houses, before and following the Restoration,[69] guaranteeing the privilege in absolute terms.[70]

During this entire developmental period the speech or debate privilege was not an end in itself, but an essential mechanism for the protection of the legislature's changing functions. Even prosecutions such as Eliot's would not have been condemned in earlier years; [71] it was only when Commons seriously asserted its

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done in a superior [court]; true it is . . . but if particular members of a superior court offend, they are oft-times punishable in an inferior court . . . . *Id.* at 307.

[66] *Id.* at 310. Eliot died in prison three years later.

[67] *See* 2 R. GNEIST, HISTORY OF THE ENGLISH CONSTITUTION 243–44 (1886); *cf.* Tenney v. Brandhove, 341 U.S. 367, 372 (1951) (Frankfurter, J.); WITTKE, *supra* note 46, at 103–06. *See also* 7 S. GARDINER, HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES I TO THE OUTBREAK OF THE CIVIL WAR 77–122 (1965).

[68] This resolution is reprinted in 3 HOW. ST. TR. 310–311 (1809). Except for the Short Parliament of 1640, the first opportunity for the House to invalidate Eliot's conviction and establish the absolute scope of the privilege was the year 1641, since Charles I governed dictatorially without Parliament from 1630 until the Civil War. TASWELL-LANGMEAD (11th ed.) 378–93.

[69] Following the interregnum, Charles II was restored to the Crown in 1660.

[70] For example, in 1667 both Houses resolved that the special act in *Strode's Case* was a general law. *See* 3 HOW. ST. TR. 314–15 (1809). In 1668, the House of Lords reversed the convictions of Eliot, Hollis and Valentine. 12 H.L. JOUR. 223 (1668); TASWELL-LANGMEAD (11th ed.) 378 n.55. In order to emphasize the permanence of its expanded jurisdiction, the House of Commons developed an interesting symbolic practice, which still persists, reminding the King of its initiative in legislation: at the beginnng of each session, a bill is read pro forma before the King's speech is considered. *See* ANSON, *supra* note 59, at 67.

[71] The Commons' protestations in *Eliot's Case* may be compared with earlier instances of passive acquiescence to the imprisonment of its members by the Crown. For example, in 1450, Sir Thomas Yonge, a member from Bristol, moved in Commons that, the King having no issue, the Duke of York should be declared heir-apparent. Henry VI, who resented this apparent meddling with his prerogative to determine the succession, ordered Yonge arrested and summarily imprisoned in the Tower of London. Yonge remained in the Tower for the next five years, and there is no record of *any* protest from Commons during this period. In 1455, the Duke of York was appointed protector, and Yonge petitioned Commons to plead his cause with the Crown. The Commons forwarded Yonge's petition to the House of Lords, and Henry VI directed the Lords to grant whatever relief they believed was "convenient and reasonable." TASWELL-LANGMEAD (4th ed.) 303. A comparison of these two cases provides additional evidence that the scope of the

right to function as the Grand Inquest that "restrictions hardly noticed before were bitterly resented; and the illusion of freedom gradually vanished from men's minds." [72] In short, as the circumstances and need for the privilege were fluid, so too was its operative scope. It is incorrect simply to view this prolonged dispute over the scope of the privilege as involving blatant and intentional violations by hostile monarchs, with the assistance of dishonest "lackey" judges, of the ancient, absolute, and well-defined rights of Parliament.[73] A more complex picture emerges from this history. To be sure, although the Tudor and Stuart monarchs were extremely hostile to developments in Parliament which threatened their prerogatives, and although they obtained assistance from judges who were no doubt devoted to maintaining the status quo, it is nonetheless true that their arguments for restricting the privilege were hardly insubstantial. To those with legalistic minds and an inclination to power in the executive, the assertions for an expanded concept of the privilege arguably represented an unwarranted attempt by irresponsible members of Parliament to abuse their position of trust and to put themselves above the law. This issue, of course, was not settled by an abstract consideration of opposing legal theories; it was settled by the historical development and popular acceptance of an independent legislative branch.

1. The Case of Sir William Williams — The evolution of the free speech privilege did not end with the Restoration; there followed another cataclysmic confrontation between the Crown and Parliament which was an immediate cause of the Revolution of 1689, the exile of James II, and the enactment of the English Bill of Rights. This confrontation is of considerable importance inasmuch as the speech or debate clause in our own Constitution was taken almost verbatim from the like provision of the English Bill of Rights.

The grievance which gave rise to the legislative free speech provision is set forth clearly in the preamble to the Bill of Rights, charging King James with subverting the Protestant religion and the laws and liberties of the Kingdom by initiating prosecutions for matters "cognizable only in Parliament." [74] Corresponding to this article of grievance was the declaration: [75]

> that the freedom of speech and debates or proceedings in Par-

privilege was not static, but evolved dynamically. *But see* WITTKE, *supra* note 46, at 24–25.

[72] Neale, *supra* note 44, at 175.

[73] Such a view was expressed forcefully by Mr. Justice Harlan in United States v. Johnson, 383 U.S. 169, 178 (1966).

[74] 1 W. & M. Sess. 2, c. 2 (1689).

[75] *Id.*

liament ought not to be impeached or questioned in any court or place out of Parliament.

This provision was not by its terms confined to spoken words and could not have been so intended, consistent with the circumstances which led to its creation. The last prosecution for words spoken in Parliament is found in *Eliot's Case* in 1629, during the reign of Charles I, and that conviction had been reversed by writ of error by the House of Lords in 1668.[76] The only reported prosecution of a member by James II was against Sir William Williams in 1686–88 for having ordered the republication of a House committee report which alleged misconduct by the King, his family and his advisors.[77] The King based this prosecution on the legal argument that prior history and cases had carefully and narrowly defined the free speech privilege to provide absolute immunity only for speeches, debates and votes within the walls of Parliament.[78] In response, Parliament asserted that the privilege encompassed all of the ordinary and necessary functions of the legislature and that the publication of proceedings was such a function.[79] The immediate purpose of the speech or debate clause of the English Bill of Rights, adopted in specific response to the Williams trial, was to confirm this broader construction for posterity.[80]

The great case of Sir William Williams arose out of circumstances beginning in the reign of Charles II, when the House of Commons, of which Williams was Speaker, received a number of narrative reports about an alleged "popish plot" between the King, his relatives and advisors, and the King of France to restore Catholicism as the established religion of England and to prevent the free exercise of religion by Protestants.[81] The most famous of these was Dangerfield's Narrative, which in lurid detail set forth

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[76] *See* note 70 *supra*; WITTKE, *supra* note 46, at 106.

[77] Rex v. Williams, 89 Eng. Rep. 1048 (K.B. 1688). *See* Report of the House Committee on the Privileges of Parliament (1771), reprinted in 8 How. St. Tr. 16–17 (1809).

> This proceeding the Convention Parliament deemed so great a grievance, and so high an infringement of the rights of Parliament, that it appears to your Committee to be the principal, if not the sole object of the first part of the eighth head [paragraph] of the means used by king James to subvert the laws and liberties of this kingdom, as set forth in the Declaration of the two Houses.

See also MCILWAIN, *supra* note 45, at 242–44; W. TOWNSEND, HISTORY OF THE HOUSE OF COMMONS 412–16 (1843).

[78] *See* Proceedings Against Sir William Williams, 13 How. St. Tr. 1370, 1377–79 (1684–1695).

[79] *Id.* at 1410–15.

[80] *See* p. 1133 *infra*.

[81] *See generally* J. POLLOCK, THE POPISH PLOT: A STUDY IN THE HISTORY OF THE REIGN OF CHARLES II (1903).

such allegations against some of the most prominent members of the royal court. A committee of the House received these narratives, the report containing them was entered in the Commons Journal, and the House then gave permission to several of its members and outside printers to publish the narratives and other papers relating to the popish plot.[82] Williams, the Speaker, requested and received permission to publish Dangerfield's Narrative.[83] Sir William Courtney, among others, went on record to support the reason for the printing: [84]

> Let men know what they please, the weight of England is the people; and the more they know, the heavier will it be; and I wish some would be so wise as to consider, that this weight hath sunk ill ministers of state, almost in all ages; and I do not in the least doubt but it will do so to those who are the enemies of our religion and liberties.

A number of prosecutions were instituted by Charles II against virulently anti-Catholic spokesmen.[85] All were found guilty of seditious libel or high treason by the judges of the King's Bench.[86] Yet even Charles II dared not attack members of Parliament. It was not until 1686, a year after James II succeeded to a turbulent throne, that the King ordered the filing of an information in the King's Bench against Sir William Williams for the publication of Dangerfield's Narrative.[87]

Williams was represented by Sir Robert Atkyns, a former judge of the Court of Common Pleas, who came out of retirement to argue on behalf of the speech or debate privilege of the House.[88] Atkyns' argument contained a remarkable exposition of

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[82] *See* 9 H.C. Jour. 630–95 (1680). The printing began in 1680 and continued through 1681 as new information was received. *See id.* at 709, 711.

[83] *Id.* at 649.

[84] 2 J. Torbuck, A Collection of the Parliamentary Debates in England 96 (1741). (Courtney's statement was made on March 24, 1681.) Another member said, less ominously:

> The Privy Council is constituted by the King, but the House of Commons is by the choice of the people. I think it not natural nor rational, that the people who sent us hither should not be informed of our actions.

Id. at 92.

[85] The earlier cases includes the Trial of William Stayley, 6 How. St. Tr. 1501 (K.B. 1678); Trial of Edward Coleman, 7 How. St. Tr. 1 (K.B. 1678); Trial of Ireland, Pickering and Grove, 7 How. St. Tr. 79 (K.B. 1678); Trial of Whitehead, Harcourt, Fenwick, Gawen and Turner, 7 How. St. Tr. 311 (K.B. 1679); Trial of Langhorn, 7 How. St. Tr. 417 (1679).

[86] *See* Pollock, *supra* note 81, at 265–87.

[87] Proceedings Against Sir William Williams, 13 How. St. Tr. 1370 (1684–1695).

[88] Atkyns had been dismissed from the bench for contradicting a dictum of Chief Justice Scroggs that "the presentation of a petition for the summoning of Parliament was high treason." Pollack, *supra* note 81, at 286.

the origin, development and purposes of the privilege. He traced the history of the privilege from its early judicial antecedents, which he claimed settled the principle that anything said or done in Parliament could not be questioned in any inferior court.[89] He then argued on a functional basis that the privilege encompassed actions of members in effectuating the powers of Parliament. He saw those powers as three-fold: a legislative power, in the enactment of statutes; a judicial power, when acting as the High Court; and a counselling, or enquiring, power, which serves both the legislative and judicial powers.[90] As evidence of this third function he cited the obligation of the House to investigate matters of state, expose corruption and maladministration, punish offending ministers and offer guidance to the king.[91]

Atkyns tied Williams' printing of the report to the enquiring function.[92] He asserted, in fact, that this function was necessary for the accomplishment of all of the House's powers.[93] Atkyns then responded to the Attorney General's contention that Williams' act of publication was outside the scope of the privilege. As a matter of common sense, he said, this was absurd.[94] The narrative had already been made public when read before the bars of both houses and entered in their Journals; the publishing in print changed nothing.[95] Finally, Atkyns asked rhetorically, "what need was there of printing it?" [96] and responded that the members of the House, "out of a sense of their duty," [97] might decide that it was necessary to inform and alert the public of Dangerfield's charges against high ministers. An enlightened public might then be encouraged to come forward and offer more information, "a fuller proof" that could lead to the prosecution,

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[89] 13 How. St. Tr. 1370, 1383–1407 (1684–1695).

[90] *Id.* at 1410–13.

[91] *Id.* at 1413.

[92] *Id.* at 1414.

[93]

> [T]he enquiry is the most proper business of the House of Commons. For this reason they are commonly styled The Grand Inquest of the nation. . . .
>
> This enquiry of theirs is necessary in a subserviency to *all* the several high powers of that high court. Namely, in order to their legislature, or to the exercise of their power of judicature.
>
> . . . .
>
> Or it may be in order to their counselling power, for removal of great officers or favorites. . . .
>
> But still they first make enquiry . . . [and] the most effectual enquiry is most probably from without doors; and without such enquiry, things of great importance may lie concealed.

Id. at 1414–15 (emphasis added).

[94] *Id.* at 1415–17.

[95] *Id.*

[96] *Id.* at 1416.

[97] *Id.* at 1418.

removal, or clearing of the ministers.[98] Publication of the report was a good way of conducting this further enquiry and had become "a most frequent practice . . . the most ordinary way of making enquiries, which run into all parts of the nation." [99]

Atkyns' argument was thus a forerunner of a standard applied two hundred years later by our Supreme Court — that the privilege protects "things generally done . . . by . . . members in relation to the business" before the legislature.[100] In other times, this argument might have succeeded, but James II dismissed the judges of the King's Bench and caused Williams to be tried by judges who were staunch believers in absolute monarchy.[101] The plea of privilege was rejected, and Williams was fined ten thousand pounds.[102]

Shortly after James II was sent into exile, a committee was appointed by the House of Commons to draft what was to become the English Bill of Rights, a proclamation for "better securing our Religion, Laws, and Liberties." [103] The committee was chaired by Sir George Treby and included Sir William Williams.[104] The committee reported back, and Treby said of the free speech guarantee:[105]

> This Article was put in for the sake of one, once in your place [*i.e.*, the Speaker], Sir William Williams, who was punished out of Parliament for what he had done in Parliament.

A delegation with Williams at its head was then sent to the House of Lords, and in February of 1689 the two Houses agreed upon the broad language of the Bill of Rights.[106] In July, the House of Commons passed a specific resolution that the judgment of the King's Bench against Williams "was an illegal Judgment, and against the Freedom of Parliament." [107]

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[98] *Id.*

[99] *Id.*

[100] Kilbourn v. Thompson, 103 U.S. 168, 204 (1880).

[101] *See* TOWNSEND, *supra* note 77, at 413; *cf.* 6 HOLDSWORTH, *supra* note 48, at 502–05.

[102] *See* Rex v. Williams, 89 Eng. Rep. 1048 (1688). Williams paid 8,000 pounds, and the King acknowledged satisfaction. *Id.* For Williams' subsequent role as legal spokesman for James II, see note 175 *infra*.

[103] 10 H.C. JOUR. 15 (January 29, 1689).

[104] *Id.*

[105] 9 A. GREY, DEBATES OF THE HOUSE OF COMMONS 81 (1763), *reprinted in* REPORT FROM THE SELECT COMMITTEE ON THE OFFICIAL SECRETS ACT 24 (H.C. 1939).

[106] 10 H.C. JOUR. 21.

[107] *Id.* at 215. A bill to reverse the conviction and compensate Williams for the fine was sent to the House of Lords. The Lords did not act favorably upon it because that would have required payment to Williams of the not insubstantial amount of 8000 pounds from a greatly depleted treasury. TOWNSEND, *supra* note

2. A Note on the Seven Bishops Case. — The great historical battles in England over freedom of speech or debate occurred as a result of legislative resistance to the Crown's vigorous assertions of executive prerogatives. This conflict over the respective powers of the executive and legislative branches is at the core of the development of the privilege. During the Tudor and early Stuart era, at stake was not only the ability of Parliament to deliberate freely, but also the maintenance of its power to function in areas such as foreign policy and the succession, which the executive claimed as solely within its province.

The seminal case of Sir William Williams should be viewed in this perspective. The Crown's motivations for attempting to stifle the Speaker of the House reflected more than chagrin over the revelations of an alleged "popish plot," or even a desire to cut off Parliament's informing function. The prosecution was an integral part of the executive's plan to extend its prerogatives and establish effective dominance over the divisive issue of religion. It was hoped that a Parliament rendered passive by successful violations of its privileges would not effectively oppose the ultimate objective of the executive, to suspend some of the fundamental laws of the nation and to place Parliament in a position subservient to the Crown.[108]

In April of 1687, shortly after the indictment of Sir William Williams, James II published a Declaration of Indulgence declaring it to be his "royal will and pleasure that . . . the execution of all and all manners of penal laws in matters ecclesiastical . . . be immediately suspended." [109] Although this assertion of executive power to nullify statutes passed by Parliament was not completely unprecedented, prior attempts to exercise this prerogative had been infrequent and had not precipitated a constitutional crisis.[110] When Charles II had declared the ecclesiastical laws suspended in 1672, the response in the House of Commons was so vehement that the King retracted his declaration and acknowl-

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77, at 415. *See also* 13 How. St. Tr. at 1438–39. Consideration was given to confiscating the estates of Jeffries and Sir Robert Sawyer, who had filed the information against Williams, but the Lords declined to do so in 1695. *Id.*

[108] *See* Taswell-Langmead (4th ed.) at 612–13. James was, in fact, largely successful in stifling parliamentary opposition. The Parliament which was assembled after Williams' indictment was exceedingly servile, granting the King, among other things, munificent supplies for the support of a standing army in time of peace. But when opposition to his religious policies began to grow in the House, James dissolved Parliament and, like Charles I before him, governed dictatorially. *See id.*

[109] Selected Statutes, Cases and Documents 389–90 (C.G. Robertson ed. (9th ed. 1949).

[110] *See* A. Pollard, The Evolution of Parliament 275–76 (1964); Taswell-Langmead (4th ed.) 290–93.

edged that the assertion of this prerogative was illegal.[111]

In 1688, James published his Declaration a second time and ordered it to be read in all the churches. When seven bishops, including the Archbishop of Canterbury, petitioned the King to rescind the order, they were charged with seditious libel.[112] Despite James' attempt to pack the King's Bench with judges who would obey his will, the court was evenly divided over the legality of the King's actions.[113] The constitutionality of the suspending power was thus left for decision by the jury.[114] This prerogative, Mr. Justice Powell told the jurors, amounted, "to an abrogation and utter repeal of all the laws . . . . If this be once allowed of, there will need no parliament. All the legislature will be in the King." [115] On June 30, 1688, the jury returned a verdict of not guilty.[116]

The Bill of Rights of 1689 abolished the suspending power, a prerogative which "was in its nature incompatible with the existence of constitutional government." [117] The first grievance enumerated in the Bill of Rights was that James II had endeavored to subvert the laws and liberties of the kingdom "[b]y Assuming and Exercising a Power of Dispensing with, and Suspending of Laws, and the Execution of Laws, without Consent of Parliament." [118] Corresponding to this grievance was the first article of the Bill of Rights: "That the pretended Power of Suspending of Laws, or the Execution of Laws by Regal Authority, without Consent of Parliament is Illegal." [119] Thus the Bill of Rights both abolished the suspending power and guaranteed the speech or debate privilege.[120] Together, the two provisions preserved the freedom of legislative debate and the force of legislative enactment, thus assuring the functional independence of Parliament in a system of separate powers.

B. Historical Developments in the United States

1. The Constitutional Convention. — The speech or debate

[111] 5 HOLDSWORTH, *supra* note 86, at 222; *see* SELECTED STATUTES, CASES AND DOCUMENTS, *supra* note 109, at 75–80.

[112] *See* TASWELL-LANGMEAD (11th ed.) 443; Case of the Seven Bishops, 12 How. St. Tr. 183, 377 (1688).

[113] 12 How. St. Tr. at 421–30.

[114] The judges could not agree upon the legal issue about which the jury should be charged, and thus left the entire decision of charge and guilt to the jury. *Id.*

[115] *Id.* at 427.

[116] *Id.* at 430–31; TASWELL-LANGMEAD (11th ed.) 443.

[117] TASWELL-LANGMEAD (4th ed.) 294.

[118] W. & M., Sess. 2, c. 2 (1689).

[119] *Id.*

[120] *See* pp. 1129–33 *supra*.

clause in article I, section 6, is the product of a lineage of free speech or debate guarantees from the English Bill of Rights of 1689 to the first state constitutions [121] and the Articles of Confederation.[122] Presumably because the principle was so firmly rooted, there was little discussion of the clause during the debates of the Constitutional Convention [123] and virtually none at all in the ratification debates.[124] Nevertheless, two aspects of these debates shed considerable light upon the delegates' intentions.

First, the Framers approached the general problem of legislative privilege with extreme meticulousness. At the time of the Convention Parliament claimed a number of privileges, most of

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[121] *See* Tenney v. Brandhove, 341 U.S. 367, 372–75 (1951). Both the Massachusetts constitution of 1780 and the New Hampshire constitution of 1784 explicitly declared as the basis of their clauses the principle that free speech or debate in the legislature is "essential to the rights of the people." MASS. CONST., part I, art. XXI; N.H. CONST., part I, art. XXX. *See also* M. CLARKE, PARLIAMENTARY PRIVILEGE IN THE AMERICAN COLONIES 69–70, 93–131 (1943). Clarke's comprehensive work does not reveal any overt challenge to freedom of speech or debate in the colonial assemblies, nor did we uncover any in our research. As an a priori matter, when one considers the political climate in states such as Massachusetts between 1760 and 1776, this appears quite incredible; the matter surely warrants further study.

[122] *See* Tenney v. Brandhove, 341 U.S. 367, 372–75 (1951). Article 5 of the Articles of Confederation provided as follows:

> Freedom of speech and debate in Congress shall not be impeached or questioned in any court or place out of Congress . . . .

We could find no debate on the language, scope, or purpose of this provision in the Articles Convention. At least two proposals utilizing language similar to that in the Articles were presented to the Constitutional Convention. The Pinckney plan provided:

> In each House a Majority shall constitute a Quorum to do business — Freedom of Speech & Debate in the legislature shall not be impeached or Questioned in any place out of it . . . .

3 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 597 (M. Farrand ed. 1911). And the Convention's Committee on Detail recommended the following language:

> Freedom of speech and debate in the Legislature shall not be impeached or questioned in any Court or place out of the Legislature . . . .

3 DOCUMENTARY HISTORY OF THE CONSTITUTION OF THE UNITED STATES 447 (1900). Toward the end of the convention both proposals were referred to the Committee of Style and Arrangement, which without explanation adopted the language of the current speech or debate clause which bars questioning "in any other place." 2 RECORDS OF THE FEDERAL CONVENTION OF 1787, at 567, 593 (M. Farrand ed. 1911). The earlier versions of the privilege invoke the language of the English Bill of Rights, which had singled out the judiciary for special mention due to the seditious libel conviction of Sir William Williams by the King's Bench. *See* pp. 1129–33 *supra*.

[123] *See* pp. 1138–40 *infra*.

[124] *See* 2 ELLIOTS DEBATES 52–54 (Massachusetts), 325, 329 (New York) (2d ed. 1937); 3 ELLIOTS DEBATES 368–75 (Virginia) (2d ed. 1937); 4 ELLIOTS DEBATES 73 (North Carolina) (1st ed. 1863). In the above debates, the speech or debate clause received only cursory mention and was approved without dissent. In each of the other state debates, there is no recorded mention of the clause.

which derived historically from its original judicial character.[125] Many of these privileges should have fallen into desuetude, given the changing functions of Parliament. Instead, however, they had become instruments of oppression.[126] Aware of these developments and fearful of legislative excess,[127] the Framers limited certain privileges and excluded others altogether. For example, the unlimited privilege from arrest and civil process was carefully defined and severely curtailed in article I, section 6.[128] The general privilege of contempt power, which had been used during the period before the Convention to imprison offending newspapermen,[129] was withheld entirely from Congress; [130] and the privilege to determine members' qualifications, as well as the related privileges of exclusion and expulsion of members, were narrowed significantly in light of Wilkes' ordeal.[131]

The Framers also inserted a provision in the Constitution which specifically overruled an important and controversial privilege. Since 1641, the House of Commons had a standing rule which forbade the publication of its proceedings either by mem-

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[125] *See* p. 1122 & notes 45–46 *supra*.

[126] *See* notes 128–32 *infra*.

[127] *See, e.g.*, J. Madison, The Federalist No. 43 (1788): "The legislative department is everywhere . . . drawing all power into his impetuous vortex."

[128] *See generally* T. Jefferson, Manual of Parliamentary Practice § 3 (1797–98). *See also* Long v. Ansell, 293 U.S. 76 (1934); Williamson v. United States, 207 U.S. 425 (1908). The privilege from arrest had been extended beyond its original scope, *see* note 46 *supra*, to include not only the persons of members and their servants, but their families and estates as well. Members of Parliament even took to selling "protections" to complete outsiders, who were thus placed beyond the reach of the common law. *See* Wittke, *supra* note 46, at 41–43. *See also* 1 T. May, The Constitutional History of England 358 (1912). Following the enactment of the English Bill of Rights, statutes were passed eliminating these abuses. The last of these statutes was 10 Geo. 3, c. 50 (1769), which limits the privilege from arrest in terms similar to those of article I, section 6 of our Constitution.

[129] *See* 1 Anson, *supra* note 59, at 161–64; p. 1138 *infra*.

[130] Mr. Justice Miller's excellent historical analysis in Kilbourn v. Thompson, 103 U.S. 168, 183–89 (1880), demonstrates how this privilege obtained only in bodies of a judicial character.

[131] Wilkes was one of the few honest members of a House of Commons, which had yielded its independence as a result of bribery and cajolery by the Crown. Wilkes' public exposure of this corruption left the House in a virtual frenzy; it passed a resolution, joined by the House of Lords, withdrawing the privilege from him so that he could be tried in the courts for seditious libel. Wilkes went into self-imposed exile until 1768, when he returned to England and was reelected to Parliament. The House thereupon expelled him and he was convicted of seditious libel and sentenced to 22 months of imprisonment. Wilkes was finally vindicated in 1782 when these actions were expunged from the records of the House. Wilkes' experiences and their effects upon the Framers' interpretation of legislative privilege are discussed in Powell v. McCormack, 395 U.S. 486, 527–31, 536–42 (1969).

bers or by the press, except by specific leave of the House. This rule was originally justified as insuring secrecy against monarchs who threatened retaliation against members who were discovered to have intruded into their prerogatives in parliamentary debates. But the rule was later invoked out of fear of misrepresentation in the press and a general intolerance of public criticism.[132] The possibility that such a rule could be invoked by the new Congress was inconsistent with the authors' theories of self-government, which presupposed the existence of an informed electorate.[133] In addition, the Framers were appreciative of the effects on public opinion and on government caused by publicizing the debates of the colonial assemblies.[134] They therefore placed in the Constitution a duty of Congress to inform the public about its deliberations.[135] This provision generated heated argumentation in the ratification debates,[136] with anti-federalists protesting that it did not go far enough since it allowed the people's representatives to conduct secret proceedings "in their judgment." They were assuaged only after Madison and other influential members of the Convention assured them that the secrecy exception would be invoked only on extremely rare occasions and that the people's representatives could be trusted to exercise considerable restraint in withholding proceedings from the electorate.[137]

Alone among the privileges claimed by Parliament, freedom of speech or debate was placed in the Constitution virtually unchanged. In light of the care with which they approached legisla-

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[132] *See* 1 ANSON, *supra* note 59, at 161–64.

[133] *See, e.g.*, J. MADISON, NOTES ON DEBATES IN THE FEDERAL CONVENTION OF 1787, at 434 (1966); 1 THE WORKS OF JAMES WILSON 422 (McCloskey ed. 1967); *cf.* 4 PAPERS OF JAMES MADISON 236–37 (Hutchenson ed. 1965); 6 WRITINGS OF JAMES MADISON 396–98 (Hunt ed. 1906).

[134] Following the practice of the House of Commons, the colonial assemblies had enjoined their members from reporting proceedings in order to preserve secrecy of operation from the Crown, or, in their situation, from Crown-appointed governors. CLARKE, *supra* note 121, at 227–34. However, beginning around 1760, several of the assemblies repealed the secrecy rule and opened their proceedings to the public. The immediate effect in one important state, Massachusetts, was that the debates over policies of resistance accentuated the sense of crisis and stirred the people of Boston to "mutiny and rage." J. POLE, POLITICAL REPRESENTATION IN ENGLAND AND THE ORIGINS OF THE AMERICAN REPUBLIC 70–71 (1966).

[135] Art. I, § 5 requires that:

> Each House shall keep a Journal of its proceedings, and from time to time publish the same, excepting such parts as may in their judgment require secrecy; and the yeas and nays of the members of either House on any question shall, at the desire of one-fifth of those present, be entered on the Journal.

[136] *See, e.g.*, Patrick Henry's plea in the Virginia Ratification Convention, 3 ELLIOTT'S DEBATES, *supra* note 124, at 170, 315–16, 375–78 (1788).

[137] *See, e.g.*, *The Virginia Ratification Debates*, 3 ELLIOT'S DEBATES, *supra* note 124, at 331 (Madison), 401 (Randolph), 409 (Madison), 459 (Mason), 460 (Madison and Mason).

tive privilege generally and the fact that the Framers were competent historians and political theorists, the conclusion seems almost inevitable that they recognized the unique and vital role of this privilege in the system of separate powers.[138] Thus, the fact that other legislative privileges were curtailed gives no warrant to dilute the speech or debate privilege, which had been molded by history as vital to the independence and integrity of the legislature. The argument to the contrary, that the abuses of other privileges can be imputed to the speech or debate privilege, an argument expressed by Chief Justice Burger in *Brewster*, depends upon an historical construction that is more creative than descriptive.[139]

The second event of importance in gauging the delegates' intent occurred during the brief debate in the Convention over the speech or debate clause. Madison proposed that the scope of the privilege be defined specifically, but this was rejected by the

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[138] James Wilson, an important member of the committee that drafted the speech or debate clause, stated the purpose of this privilege in these terms:

> In order to enable and encourage a representative of the publick to discharge his publick trust with firmness and success, it is indispensably necessary, that he should enjoy the fullest liberty of speech, and that he should be protected from the resentment of every one, however powerful, to whom the exercise of that liberty may occasion offence.

2 WORKS OF JAMES WILSON 421 (McCloskey ed. 1967).

There is little doubt that in speaking of the "powerful," Wilson is referring primarily to the executive branch. *Cf.* United States v. Johnson, 383 U.S. 169, 181–82 (1966).

[139] United States v. Brewster, 408 U.S. 501, 516–21 (1972). In arguing for a limited construction of freedom of speech or debate, the Chief Justice stated:

> The history of *the privilege* is by no means free from grave abuses by legislators. In one instance, abuses reached such a level in England that Parliament was compelled to enact curative legislation.

Id. at 517 (emphasis added). He then cited WITTKE, *supra* note 46, at 39, for examples of abuse. Yet all of these abuses, as well as the "curative legislation," dealt with the privilege from arrest, not the privilege of speech or debate. *See* WITTKE, *supra* note 46, at 39–42. *See also* note 128 *supra*.

The Chief Justice then compounds the error by specifically referring to the privilege from arrest and emphasizing its limited scope. 408 U.S. at 520–21. He then states: "We recognize that the privilege against arrest is not identical with the Speech or Debate privilege, but it is closely related in purpose and origin." *Id.* at 521. No citation or authority is given for this remarkable proposition. The statement would have been substantially true in the 1400's, but totally ignores the completely separate development of the two privileges over the 500 years that followed. While the original formulation of both privileges protected burgesses only from interference by private persons with their parliamentary functions, *see* pp. 1122–23 & notes 46–48 *supra*, the speech or debate privilege developed into a shield against interference by the King. The freedom from arrest privilege, however, never applied to executive-motivated actions. *See* note 46 *supra*.

Earlier in his analysis, the Chief Justice combined both of these errors when he attempted to invoke the memory of the Framers: "The authors of our Constitution were well aware of the history of both the need for the privilege and the abuses that could flow from too sweeping safeguards." *Id.* at 517. If the case under decision had involved a legislator invoking the privilege against arrest to

Convention.[140] Although there is no direct evidence of the reason behind the Convention's action, it may be inferred that the Framers were heeding Blackstone's warning that such definitions could be counterproductive, for if [141]

> no privilege [were] to be allowed but what was so defined and determined, it were easy for the executive power to devise some new case, not within the line of privilege, and under pretence thereof to harass any refractory member and violate the freedom of parliament.

Madison himself was later to agree, advocating a functional approach to the privilege. [142]

2. Post-Convention Developments. — The great ideals of the Constitution were not long in print before they were tested by intense factional disputes which threatened the Republic's future. Internecine conflict was mitigated by the unifying role of President Washington, but even limited tolerance gave way to undisguised suppression under the administration of John Adams.[143] The most forceful and persistent of the executive's critics were in the press and in Congress. And the Federalist administration enlisted the judiciary to intimidate both groups.[144]

(a) The Cabell Grand Jury Investigation and Jefferson's Protest. — In 1797, a federal grand jury was impanelled in Virginia to investigate the conduct of several anti-Federalist members of Congress, including Congressman Cabell of Virginia, who had sent newsletters to their constituents attacking the administration's policy in the war with our former ally, France. The administration declared the newsletters to be "seditious," to contain information valuable to the enemy, and to threaten the security of

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bar a civil suit for nonpayment of debt, this statement would be persuasive; all of the "history," "abuses" and "the privilege" discussed involve that privilege. If the delegates were aware of a long "history" of "abuses" from "too sweeping safeguards" of freedom of speech and debate, they certainly kept this to themselves. All of the available evidence, including Jefferson's great protest in *Cabell's Case*, note 150 *infra*, supports the conclusion opposite to that asserted by the Chief Justice. Compare his opinion in Powell v. McCormack, 395 F.2d 577, 599–602 (D.C. Cir. 1968), *aff'd in part, rev'd in part*, 395 U.S. 486 (1969), where the clause's history and purpose were set forth more accurately.

[140] *See* Cella, *supra* note 46, at 14–15.

[141] 1 BLACKSTONE'S COMMENTARIES 164 (1765).

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> In the application of the privilege to emerging cases, difficulties and differences of opinion may arise. In deciding on these the reason and necessity of the privilege must be the guide.

4 WRITINGS OF JAMES MADISON 221 (1865).

[143] *See* J.M. SMITH, FREEDOM'S FETTERS (1956); Carroll, *Freedom of Speech and the Press in the Federalist Period: The Sedition Act*, 18 U. MICH. L. REV. 615 (1920).

[144] *See* SMITH, *supra* note 143; Caroll, *supra* note 143.

the nation.[145] The grand jury was placed under the supervision of Mr. Justice Iredell. Spurred by his inflammatory charge,[146] the grand jury levied indictments against Cabell and others for disseminating "unfounded calumnies" against the government.[147]

Thomas Jefferson, who was then Vice-President of the United States and a leading contemporary expert on congressional procedure,[148] immediately drafted a long essay in the form of a protest to the Virginia House of Delegates, signed by himself and other leading citizens of the district represented by Cabell. Jefferson's treatise condemned the grand jury's investigation as an overt violation of the congressional privilege and of the doctrine of separation of powers. The draft was forwarded to Madison, who joined in supporting it and suggested minor changes.[149] These changes were then adopted by Jefferson and the protest was sent to the House of Delegates. The significance of this eloquent protest goes beyond even the stature of its authors; it is a cogent analysis of the purposes and scope of the speech or debate clause, as well as the limitations the clause places on grand jury investigations.[150] Jefferson's protest ended with a petition that the

[145] *See* 8 Works of Thomas Jefferson 325 (Ford ed. 1904).

[146] *See* I. Brandt, James Madison: Father of the Constitution 460 (1950); M. Peterson, Thomas Jefferson and the New Nation 605 (1970).

[147] 8 Works of Thomas Jefferson 325 (Ford ed. 1904).

[148] While Vice-President, Jefferson compiled the authoritative Manual of Parliamentary Practice. This manual is controlling in the House of Representatives except when in conflict with a standing rule. *See* Rule XLII in L. Deschler, Constitution, Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 439, 91st Cong., 2d Sess., § 938, at 540 (1971).

[149] Letter from Madison to Jefferson, August 5, 1797, in Presidential Papers Microfilm, James Madison Papers, Series I: 1796 Jan. 5 — 1801 June 14 (Library of Congress).

[150] 8 Works of Thomas Jefferson 322–31 (Ford ed. 1904):

> [I]n order to give to the will of the people the influence it ought to have, and the information which may enable them to exercise it usefully, it was a part of the common law, adopted as the law of this land, that their representatives, in the discharge of their functions, should be free from the cognizance or coercion of the coordinate branches, Judiciary and Executive; and that their communications with their constituents should of right, as of duty also, be free, full, and unawed by any: that so necessary has this intercourse been deemed in the country from which they derive principally their descent and laws, that the correspondence between the representative and constituent is privileged there to pass free of expense through the channel of the public post, and that the proceedings of the legislature have been known to be arrested and suspended at times until the Representatives could go home to their several counties and confer with their constituents.

Id. at 322–23.

> [F]or the Judiciary to interpose in the legislative department between the constituent and his representative, to control them in the exercise of their functions or duties towards each other, to overawe the free correspondence which exists and ought to exist between them, to dictate what communications may pass between them, and to punish all others, to put the representative into jeopardy of criminal prosecution, of vexation, expense, and punishment before the Judiciary, if his communications, public or private, do not exactly square with their ideas of fact or right, or with

House of Delegates order the arrest and imprisonment of the grand jurors [151] for this "great crime, wicked in its purpose, and mortal in its consequences," which not only jeopardized Cabell personally, but infringed the rights of the people.[152] The petition apparently mobilized public opinion, because the grand jury quickly withdrew its presentment.[153]

(*b*) *Matthew Lyon's Case.* — Intimidation of critical members of Congress did not end with the aborted grand jury investigation of Congressman Cabell. In 1798, the administration obtained an even more potent weapon for use against its opponents — the Sedition Act.[154] As he had predicted,[155] Matthew Lyon, a vociferous anti-Federalist congressman from Vermont, was the first person prosecuted under the Act.[156] His trial, its effects on representative government, and the public reaction it generated, bore witness to the effects on the doctrine of separation of powers which result when the executive and judicial branches take action against a legislator who speaks out against policies thought by the executive to be "essential" to the national security.

> their designs of wrong, is to put the legislative department under the feet of the Judiciary, is to leave us, indeed, the shadow, but to take away the substance of representation . . . is to do away the influence of the people over the proceedings of their representatives by excluding from their knowledge, by the terror of punishment, all but such information or misinformation as may suit their own views; and is the more vitally dangerous when it is considered that grand jurors are selected by officers nominated and holding their places at the will of the Executive . . . and finally, is to give to the Judiciary, and through them to the Executive, a complete preponderance over the legislature rendering ineffectual that wise and cautious distribution of powers made by the constitution between the three branches, and subordinating to the other two that branch which most immediately depends on the people themselves, and is responsible to them at short periods.

Id. at 325–27.

[151] *Id.* at 329–30.

[152] *Id.* at 331.

[153] *See* J.M. Smith, Freedom's Fetters 95 (1956); Koch & Ammon, *The Virginia and Kentucky Resolutions: An Episode in Jefferson's and Madison's Defense of Civil Liberties*, 5 William and Mary Quarterly 152–53 (third series 1948). That the protest was aimed principally at allerting public opinion seems evident from Madison's letter, in which he stated:

> It is certainly of great importance to set the public opinion right with regard to the functions of grand juries, and the dangerous abuses of them in the federal courts; nor could a better occasion occur.

Letter from Madison to Jefferson, August 5, 1795, in Presidential Papers Microfilm, James Madison Papers, Series I: 1796 Jan. 5–1801 June 14 (Library of Congress).

[154] 1 Stat. 543 (July 14, 1798).

[155] Lyon's Case, 15 F. Cas. 1183, 1185 (No. 8646) (C.C.D. Vt. 1895) (the case was decided in 1798).

[156] *Id.* This case is also discussed in detail in Smith, *supra* note 153, at 221–41, in a chapter aptly entitled *The Ordeal of a Critical Congressman.* Mr. Justice Patterson's role in the case is also discussed in Kraus, *William Patterson*, 1 The Justices of the United States Supreme Court 163, 170–71 (L. Friedman & F. Israel eds. 1969).

Lyon was indicted and tried under the Sedition Act for publishing two letters: the first accused the President of an "unbounded thirst for ridiculous pomp, foolish adulation, and selfish avarice" and the second reprinted a communication from France containing a charge of "stupidity" in the nation's policy toward France.[157] Supervising the grand jury was Mr. Justice Patterson, who instructed the jurors to look carefully at "the seditious attempts of disaffected persons to disturb the government." [158] The grand jury issued the indictment against Lyon on October 5, 1798,[159] 2 days after it was impanelled and at a time when Lyon was a candidate for reelection to a House equally divided between Federalists and anti-Federalists.[160]

Lyon's trial began 4 days later. He was represented by the Chief Justice of Vermont, but the latter withdrew when Justice Patterson refused to allow the defense adequate time for preparation.[161] Lyon was ignorant of the law and offered no real defense.[162] Following one-sided instructions by Justice Patterson, the jury found Lyon guilty as charged.[163] He was sentenced to 4 months' imprisonment and fined $1,000.

The lesson which the Administration sought to achieve in jailing Lyon was not unheeded; Jefferson wrote that "Lyon's judge, and jury . . . are objects of national fear." [164] But the Adams Administration's careful planning was upset when Lyon's constituents, enraged at the imprisonment of their representative for criticizing Adams, formed a mob and threatened to free him forcibly. Lyon apparently perceived the political leverage he now possessed, and quieted the mob. His continued imprisonment was so embarrassing "that the cabinet panted for an excuse to liberate him." [165] He was offered a pardon and money in return for an apology (the President said that "repentance must precede mercy"), but Lyon refused.[166] He was reelected while in jail by a comfortable majority and released from prison at the conclusion

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[157] Lyon's Case, 15 F. Cas. 1183, 1184 (No. 8646) (C.C.D. Vt. 1895) (case decided in 1798).

[158] Kraus, *supra* note 156, at 170.

[159] *Id.*

[160] Lyon's Case, 15 F. Cas. 1183, 1187 (No. 8646) (C.C.D. Vt. 1895).

[161] *Id.* at 1185.

[162] *Id.* at 1187.

[163] Patterson charged the jury to decide two points: 1) whether Lyon authored the writings in question, and 2) whether he wrote them seditiously, with "bad intent." The first issue was not contested. Kraus, *supra* note 156, at 170–71. But Justice Patterson never mentioned the propriety of legitimate political opposition, the defense of truth, or even the possibility of acquittal. *Id.*

[164] *Id.*

[165] Lyon's Case, 15 F. Cas. 1183, 1189 (No. 8646) (C.C.D. Vt. 1895).

[166] *Id.* at 1190.

of the sentence.[167] On his return trip to Congress, he was hailed by crowds rivaling those at Washington's inauguration.[168] A move by Federalist forces in the House to expel him failed to muster the necessary two-thirds vote, and Lyon served another 10 years.[169] Final vindication came in 1840, when a bill was passed by both houses and signed by the President voiding the judgment.[170]

Acting in his own defense, Lyon had not raised article I, section 6 as a defense to his prosecution, and the issue of the speech or debate privilege was not litigated at his trial. But *Lyon's Case* is nonetheless vitally important to the doctrine of legislative privilege. Lyon is the only member of Congress in American history to be tried and convicted in the courts for openly criticizing national policy. His trial and its aftermath illustrate vividly the harm to separation of powers which the Framers sought to prevent by including the speech or debate clause in the Constitution.[171]

III. The Scope of the Privilege

In defining the scope of the speech or debate privilege in "emerging cases," Madison wrote, "the reason and necessity of the privilege must be the guide."[172] The historical development of the privilege in both England and America reveals a fundamental principle — that the speech or debate privilege arose dynamically to preserve the functional independence of the legislature. If it is to serve this purpose effectively, its content can-

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[167] *Id.*

[168] Smith, *supra* note 153, at 241.

[169] Lyon's Case, 15 F. Cas. 1183, 1190 (No. 8646) (C.C.D. Vt. 1895).

[170] *Id.* at 1191.

[171] Other constitutional privileges have been implicated in cases in which they were not specifically litigated. The Supreme Court has observed that the trials of newsmen under the Sedition Act, 1 Stat. 596 (1798), "first crystallized a national awareness of the central meaning of the First Amendment." New York Times Co. v. Sullivan, 376 U.S. 254, 273 (1964). Many of the newsmen in these cases served as their own counsel, as did Lyon, either by their own choice or because Federalist judges were generally hostile to defense counsel. Thus the constitutional provision was often not raised as a defense. *See, e.g.*, the trials of Thomas Cooper in F. Wharton, State Trials of the United States During the Administrations of Washington and Adams 659–79 (1849). *See also* the trial of John Freis for treason, *id.* at 610–41. When newsmen represented by counsel did attempt to raise the constitutional issue, they were often ordered to abandon the effort. *See, e.g.*, the trial of James T. Callender, *id.* at 710–13. Considering the attitude of Mr. Justice Patterson in the *Lyon* case, p. 1143 & notes 158–63 *supra*, there can be little doubt that the claim of privilege would have been summarily dismissed had Lyon raised it.

[172] 4 Writings of James Madison 221 (Hunt ed. 1910); *see* note 142 *supra*.

not be frozen by the role of the burgesses of five hundred years ago, or by the events leading to the execution of Charles I, or even by the conditions prevalent in 1787. Instead the clause must be shaped, as it has always been, by the contemporary functions of the legislature in a system of separation of powers.[173]

The historical development of the privilege should also demonstrate that it is an over-simplification to assert that the only argument supporting a broad construction is based upon exaggerated fears of a runaway and tyrannical executive.[174] Any system of government based on separation of powers contains inherent friction, and clashes between the legislative and executive branches over their respective prerogatives are inevitable. It should be remembered that past threats to legislative independence have come, in the main, from executives who were unquestionably sincere in their beliefs but unable or unwilling to settle their differences with critical legislators in the political arena.[175] But even well-meaning

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[173] *See* Cella, *supra* note 45, at 34. Chief Justice Burger diluted the importance of the English experience by pointing out that

> the English system differs from ours in that their Parliament is the supreme authority, not a coordinate branch. Our speech or debate privilege was designed to preserve legislative independence, not supremacy.

United States v. Brewster, 408 U.S. 501, 508 (1972). He drew on a statement from United States v. Johnson, 383 U.S. 169 (1966), that the privilege "was the culmination of a long struggle for parliamentary supremacy." *Id.* at 178. But this view of the development of the privilege in England is mistaken. In its formative period — from 1540 through 1688 — the privilege was asserted by Parliament as a necessary defense of its growing independence. During that period, Parliament was attempting to preserve and extend its functions in a system of balance of powers. Neither the claim nor the reality of Parliamentary supremacy was to come until much later.

[174] *But see* Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335 (1965).

[175] *See* pp. 1123–28, 1140–44 *supra*. The only clear exception was the prosecution of Sir William Williams by James II, whose despotic ambitions were nurtured by a zealous belief in the divine right of kings. 13 How. St. Tr. 1370 (1686–1688). Yet even in this instance, one should hesitate before regarding the King's opponents as unyielding defenders of liberty. After Sir William Williams was convicted, he turned full circle and swore loyalty to the King. Williams, who had already been driven close to bankruptcy by the judgment in his criminal action, was sued by the Earl of Peterborough, who had been unfavorably mentioned in Dangerfield's Narrative and who demanded large damages from Williams. The King and Williams then struck a bargain whereby the civil action would be dropped if Williams became Solicitor General. To writers who lacked charity for former Whigs who aided the opposition, such a deal "to a man of strong principles . . . would have been more dreadful than beggary, imprisonment, or death." 2 T. MACAULAY, THE HISTORY OF ENGLAND FROM THE ACCESSION OF JAMES THE SECOND 988–89 (C. Firth ed. 1968).

As Solicitor General, Williams, a prior enemy and victim of James' oppressive policies, represented the King in the prosecution of the seven bishops. *See* pp. 1134–35 & notes 108–119 *supra*; Case of the Seven Bishops, 12 How. St. Tr. 183, 202 (1688). Not only did Williams argue that the King had the inherent power to

executive challenges to legislative activities can have a serious impact upon traditional legislative functions. When one considers that the cases involving the privilege have often subsumed such legitimate disputes between the executive and the legislature over their respective prerogatives, the prophylactic purposes of the doctrine of legislative privilege are magnified.

These considerations indicate that in executive-motivated suits, any contemporary legislative practice which is necessary to fulfill one of the goals of representative government should fall within the ambit of the speech or debate clause. In considering whether a given practice is protected by the clause, guidance is available in the actual workings of Congress to determine whether it is widely utilized by members in the performance of their duties. But the ultimate focus must be the functioning of the legislature according to the doctrine of separation of powers, so that the privilege, which is an historical derivative of that doctrine, will continue to be defined by it. Of course this does not mean that the privilege should extend to all of a congressman's actions simply because of his status. For example, crimes such as assault and battery or armed robbery should be beyond the scope of the privilege, even if fortuitously committed within the walls of the Capitol.[176] Such crimes are not legislative functions, and their commission in no way supports the system of separate powers.

A broad construction of the privilege in cases involving conflicts between the executive and legislators is also necessitated by considerations of judicial independence. Courts do violence to a democratic separation of powers when they legitimize executive

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suspend ecclesiastical laws without the consent of Parliament, *id.* at 402–17, but he also cited his own conviction as precedent against some of the bishops' legal arguments. *Id.* at 226–29. To complete this surprising role reversal, the bishops were represented by Sir Robert Sawyer, who was the Attorney General who had prosecuted Williams. *Id.* at 202–03.

Following the Restoration, Williams disavowed the positions he had taken as Solicitor General in the *Seven Bishops* case. He opposed publication of the trial transcript, *id.* at 201, and in a later case, when discussing the *Seven Bishops* case, said to the King's Bench: 'I will not undertake to justify the proceedings of the late Government: we have all done amiss, and must wink at one another." Prynn's Case, 87 Eng. Rep. 764, 766 (1691).

[176] Special problems are presented in prosecutions of crimes such as bribery, in which the charge is often intertwined with a privileged act. Since the speech or debate clause precludes inquiry into a congressman's "legislative acts . . . [and] his motives for performing them," the privilege might operate to bar the admissibility of evidence. United States v. Johnson, 383 U.S. 169, 185 (1966). *See also Ex parte* Wason, L.R. 4 Q.B. 573 (1869). In this sense, the speech and debate privilege operates testimonially — to prevent questioning of legislators concerning their activities — in a manner akin to the privilege against self-incrimination or the attorney-client privilege. *See* REPORT FROM THE SELECT COMMITTEE ON THE OFFICIAL SECRETS ACTS 9 (House of Commons 1939). This is discussed more fully at pp. 1157–63 *infra*.

assaults upon legislative prerogatives. If the courts define the privilege narrowly, so as to entertain on the merits executive-motivated challenges to legislative activities, they will subject themselves to weighty pressures which threaten to politicize their processes. Such pressures have too often proved irresistible in the past. Whether couched in terms of "sedition," "treason," or "espionage," the essential position of the executive in these cases has been that legislators have jeopardized policies which the executive believes are essential to the furtherance of important national interests. Understandably, the traditional inclination of the courts has been to entertain the executive's claims of impending disaster with a sympathetic ear, and to view the actions (and sometimes motives) of the offending legislators as irresponsible or unpatriotic, or both.[177] But neither Congress nor the English Parliament has been full "of spies and traitors," [178] and judicial decisions restricting the privilege at the behest of the executive have later been regretted as unfortunate instances of judicial overreaction.[179] Judi-

[177] See notes 65 & 102 *supra* for the perspectives of Justices of the King's Bench in Eliot's and Williams' cases, and pp. 1140–43 *supra* for those of two American Justices in Cabell's and Lyon's cases. *See also* Gravel v. United States, 408 U.S. 606 (1972), in which Justice Douglas, in dissent, pointedly stated that judicial hostility "emanates from every phase of the present proceeding." *Id.* at 633.

[178] In 1938, an opposition member of the House of Commons, Duncan Sandys, obtained and disclosed secret military documents, allegedly in violation of the Official Secrets Act, 10 & 11 Geo. 5, c. 75 (1920). The documents revealed the inadequacy of anti-aircraft defenses around London, and Sandys hoped to mobilize public opinion to remedy the situation. A military court of inquiry subpoenaed Sandys for interrogation about the source of the documents. The House appointed a special committee to consider the applicability of the Official Secrets Act to members of Parliament. During the course of debate, Clement Atlee stated:

> Unless Members of Parliament can have reasonable access to knowledge they cannot criticise Ministers effectively. It is our duty to criticise Ministers who are in charge of the administration . . . .
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> . . . .
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> In practice Members of Parliament do not abuse their privileges; we are not a House of spies and traitors, and the House has its own method of dealing with hon. Members and of keeping them within bounds. I think it is essential for the life of this House that this House itself should make itself responsible for hon. Members. There is a danger in any suggestion that there should be some outside court or sanction brought in.

337 PARL. DEB. H.C. (5th Ser.) 2167 (1938). The Committee agreed with Atlee on this point. *See* REPORT FROM THE SELECT COMMITTEE ON THE JUDICIAL SECRETS ACTS 15 (House of Commons 1939). *But see* note 212 *supra*.

[179] In Rex v. Wright, 101 Eng. Rep. 1396, 1398 (1799), one Justice of the King's Bench said of the *Williams* case that it "happened in the worst of times" and another said that it was "a disgrace to the country." The same may properly be said of the actions of Justices Iredell and Patterson in the *Cabell* and *Lyon* cases. *See* pp. 1140–43 *supra*.

The phenomenon of judicial over-deference to executive claims of protecting national interests is not, of course, limited to legislative immunity cases. It has occurred with some frequency in first amendment cases as well. *See generally* T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION (1970).

cial neutrality can be assured only by a broad definition of the privilege, which leaves judgments about the propriety of specific exercises of legislative functions in the political arena. Which legislators are heroes in their conflicts with the executive, and which are villains, is a matter best left to the collective deliberation of their colleagues and of their constituents.

These considerations have little applicability in private civil cases. None of the cases which led to the incorporation of the privilege in our Constitution involved a suit by a private individual claiming that his rights were violated.[180] Although the early judicial origins of the privilege certainly would have barred such suits,[181] only under the static historical view would that result necessarily persist. But the functional approach which derives from our historical analysis suggests that the operation of the clause should be different in cases where it is asserted against individual rights than in those where it is asserted against executive intrusions.[182] For reasons which will be developed more fully,[183] the proper functioning of our system of separation of powers requires that in at least one instance involving a clash of individual rights and the privilege — where rights guaranteed by the Constitution are infringed — judicial review should not be foreclosed by the speech or debate clause.

In this section of the Article, we analyze the contemporary role of Congress to determine which congressional activities should be defined as "legislative functions" for the purpose of the speech or debate clause. We examine the question whether collective congressional action can divest individual congressmen of the privilege, and we attempt to distinguish between executive-motivated and civil suits against legislators.

A. The Informing Function

A major issue in the *Gravel* case was whether the acquisition of the Pentagon Papers and the Senator's private publication of the committee record were beyond judicial inquiry. Adopting a

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[180] There were, in fact, no civil suits against members of Parliament involving the speech or debate privilege before our Constitution was written. *But cf. Strode's Case*, *supra* note 47 (private criminal case in 1512 involving privilege when still tied to judicial origins). This is probably the result of two factors: (a) private litigants may have felt that bringing such actions was useless; and (b) they may have been deterred by the existence of another privilege, by which the House of Commons committed for contempt those individuals who had insulted members. *See* WITTKE, *supra* note 46, at 49–51.

[181] See the discussion of *Strode's Case*, *supra* note 47. *See also Ex parte* Wason, L.R. 4 Q.B. 573 (1869).

[182] *See* pp. 1172–74 *infra*.

[183] *See* pp. 1174–77 *infra*.

narrow definition of the scope of the privilege and asserting that these matters were not part of "legislative activity," the Supreme Court held that they were not privileged.[184] Specifically, the Court held that while a Senator cannot be questioned about his conduct in committee, he can be interrogated about how he obtained materials for the hearing and how he secured publication of the committee record. In so holding, the Court adopted an inadequate definition of "legislative activity," which allowed executive and judicial inquiry in precisely that kind of situation which the speech or debate clause was designed to forbid.

1. Publication of Legislative Proceedings. — The scheme of representative government envisaged by the Constitution presupposes an obligation on the part of a legislator to inform his constituents and colleagues about vital matters concerning the administration of government and national affairs.[185] The informing function plays a key role in our system of separation of powers, insuring that the administration of public policy by the innumerable nonelected officials of the executive department is fully understood by the legislature and the people.[186] In contemporary times, as much as when the Constitution was written, the informing function acts to preserve the basic character of our constitutional government.[187] For a system of self-government to be viable, the people must be fully informed of the workings of their government so that they may meaningfully exercise their rights to vote and to "free public discussion of the stewardship of public officials." [188] Congressmen should thus be unhindered in performing their duty of informing the electorate.[189]

The publication of congressional committee proceedings and their dissemination to the electorate play other important roles in

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[184] Gravel v. United States, 408 U.S. 606 (1972). The Court had held, in United States v. Brewster, 408 U.S. 501 (1972), that the Senator's activities were not "legislative," but were merely "political." *Id.* at 512. *But see* pp. 1150–53 *infra*.

[185] This was recognized by the Supreme Court in Watkins v. United States, 354 U.S. 178 (1957). In speaking of the "power of Congress to inquire into and publicize corruption, maladministration or inefficiency in agencies of Government," the Court noted that "[f]rom the earliest times in its history, the Congress has assiduously performed an 'informing function' of this nature." *Id.* at 200 n.33.

[186] *See, e.g.*, W. Wilson, Congressional Government 303 (1885).

[187] The centrality of the informing function to democratic institutions has been emphasized even by those political theorists who, while doubting the capacity of legislative bodies to legislate, nonetheless believed that by overseeing the administration of government they would make an essential contribution to the protection of liberty. *See, e.g.*, J.S. Mill, Considerations of Representative Government 42 (People's ed. 1873).

[188] New York Times Co. v. Sullivan, 376 U.S. 254, 275 (1964).

[189] Wilson, *supra* note 186, at 303.

representative government. The heart of representative democracy is the communicative process between the people and their agents in government.[190] By making accurate reports of these proceedings widely available, congressmen enlighten the electorate and at the same time insure that the people will inform them and their colleagues of their well-considered views on pending or potential legislation. Practically every careful student of Congress has observed this process and has also noted that committee hearings and the publication and distribution of speeches and committee reports form the principal avenue for achieving it.[191]

In examining whether informing constituents through publication is a "legislative act," it is also pertinent to note that congressmen understand both the utility and necessity of holding committee hearings and publishing their proceedings in order both to enlighten the electorate and affect future legislation.[192] Accordingly, Congress has provided a variety of financial and other supports for communications between a legislator and the public.[193] One study revealed that a majority of congressmen send newsletters to the public on a periodic basis,[194] and it has also been

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[190] *See, e.g.*, SELECTED POLITICAL ESSAYS OF JAMES WILSON 169–70 (Adams ed. 1930).

[191] *See, e.g.*, J. BIBBY & R. DAVIDSON, ON CAPITOL HILL 13 (1967); E.S. GRIFFITH, CONGRESS: ITS CONTEMPORARY ROLE 249–53 (4th ed. 1967); J.P. HARRIS, CONGRESS AND THE LEGISLATIVE PROCESS 41 (1967); THE REORGANIZATION OF CONGRESS, A REPORT OF THE COMMITTEE ON CONGRESS OF THE AMERICAN POLITICAL SCIENCE ASS'N 13–14 (1945). *See also* H. LASKI, THE AMERICAN PRESIDENCY: AN INTERPRETATION 158 (1940). *Cf.* C.L. CLAPP, THE CONGRESSMAN: HIS WORK AS HE SEES IT 100–01 (1963).

[192] *See, e.g.*, CLAPP, *supra* note 191, at 265–66; W. MORROW, CONGRESSIONAL COMMITTEES 91–97 (1969); O. TACHERON & M. UDALL, THE JOB OF A CONGRESSMAN 117, 280–88 (1966).

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> Such provisions include the franking privilege for sending letters, the telephone and telegraph allowance, the stationery allotments, use of the Joint Senate-House Radio-Television facilities, free distribution of the *Congressional Record*, favorable prices on personal reprints from the *Record*, and free use of the folding rooms which collate, fold, stuff, package and mail Congressional newsletters, polls and other communications directed to constituents.

C. HAWVER, THE CONGESSMAN'S CONCEPTION OF HIS ROLE, 54–55 (1963). *See also* Gravel v. United States, 408 U.S. 606, 650 (1972) (Brennan, J., dissenting); CLAPP, *supra* note 191, at 58–60, 89.

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> In 1962 a confidential House survey showed that 231 of 437 members of the House used franked-mail newsletters, mailed weekly or on another periodic basis. Of the 231, some 15 Congressmen sent out 400,000 or more pieces of free mail each during the first seven months of the year while 19 sent out 300,000 to 400,000 pieces. . . . In the middle range, well scattered between 5,000 and 300,000 pieces, were 168 (about 73%), while only 29 sent out 5,000 pieces or less.

HAWVER, *supra* note 193, at 56. The Post Office has reported that the amount of franked mail increased from 44.9 million pieces in 1955 to 63.4 million in 1958 and 111 million in 1962. CLAPP, *supra* note 191, at 59.

found that congressmen spend a substantial portion of their time informing the electorate.[195]

The informing function is a fact of life in the modern Congress, and it surely cannot be dismissed cynically as a mere device for congressmen to woo votes.[196] Many congressional hearings have been held and extensively publicized in order to enlighten the electorate about activities which were inimical to the general welfare, and have resulted in public pressure for the consequent passage of important legislation. A small sample might include the famous inquiries conducted by the Kefauver committees on organized crime and on dangerous drug practices,[197] by the Senate rackets subcommittee on the regulation of internal operation of labor unions,[198] by the LaFollette civil liberties committee,[199] by the 1965 Senate committee hearings on automobile safety,[200] and by the Fulbright committee on the Reconstruction Finance Corporation.[201] With respect to investigations of executive conduct, one

[195] *See, e.g.*, the results of congressional surveys in TACHERON & UDALL, *supra* note 192, at 280–88.

[196] *But see* United States v. Brewster, 408 U.S. 501 (1972), where the Court did just that. Chief Justice Burger distinguished "legislative" from "political" activities of congressmen. The latter, termed "legitimate 'errands' performed for constituents," were said to include

> making of appointments with Government agencies, assistance in securing Government contracts, preparing so-called 'news letters' to constituents, news releases, and speeches delivered outside Congress. . . . They are performed in part because they have come to be expected by constituents, and because they are a means of developing continuing support for future elections.

Id. at 512. Senator Ervin has stated that these comments show a basic lack of respect for a coordinate branch of government and amount to a "serious affront." Ervin, *The Gravel and Brewster Cases: An Assault on Congressional Independence*, 118 CONG. REC. S 13,610, 13,612 (daily ed. Aug. 16, 1972).

[197] *Hearings on Investigation of Organized Crime in Interstate Commerce Before the Senate Special Comm. to Investigate Organized Crime in Interstate Commerce*, 81st Cong., 2d Sess. (1950) & 82d Cong., 1st Sess. (1951).

[198] *Hearings on Violation or Nonenforcement of Government Laws and Regulations in the Labor Union Field Before the Permanent Subcomm. on Investigations of the Senate Government Operations Comm.*, 85th Cong., 1st Sess. (1957); *Hearings on the Investigation of Improper Activities in the Labor or Management Field Before the Senate Select Comm. on Improper Activities in the Labor or Management Field*, 85th Cong., 1st Sess. (1957) through 86th Cong., 1st Sess. (1959).

[199] *Hearings on Violations of Free Speech and Assembly and Interference with Rights of Labor Before a Subcomm. of the Senate Comm. on Education and Labor*, 74th Cong., 2d Sess. (1936) through 76th Cong., 1st Sess. (1939).

[200] *Hearing on Federal Role in Traffic Safety: Examination and Review of Efficiency, Economy, and Co-ordination of Public and Private Agencies, Activities and the Role of the Federal Government Before the Subcomm. on Executive Reorganization of the Senate Comm. on Government Operations*, 89th Cong., 1st Sess. (1965).

[201] *Hearings on a Study of the Operations of the Reconstruction Finance Corporation Pursuant to S. Res 219 Before a Subcomm. of the Senate Comm. on Banking and Currency*, 81st Cong., 2d Sess. (1950) & 82d Cong. 1st Sess. (1951).

might add the Wheeler-Walsh exposure of scandal in the Harding administration,[202] the Truman-Mead hearings on national defense [203] and of course, many more recent hearings on the origins and conduct of the Vietnam War.[204]

The constitutional evil which would result from denying the privilege's applicability to the informing function of Congress should be apparent, particularly when this is done at the behest of the executive and with respect to material which is critical of executive behavior. If the executive branch may institute grand jury proceedings and interrogate witnesses about the publication of their speeches and committee reports which congressmen send to the electorate, legislators will inescapably be inhibited from communicating to constituents — in press releases, newsletters, and anything spoken outside of Congress. Fear of harassment, grand jury investigations, and even prosecutions will isolate congressmen from their constituents,[205] thus undermining an important legislative function.

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[202] *See* Frankfurter, *Hands off the Investigations*, 38 THE NEW REPUBLIC 329–31 (1924).

[203] *Hearings on Investigation of the Nation's Defense Program Before a Senate Special Comm. Investigating the National Defense Program*, 77th Cong., 1st Sess. (1941) through 80th Cong., 1st Sess. (1947).

[204] *See* THE VIETNAM HEARINGS (1966) (copyright and intro. by J.W. Fulbright); THE TRUTH ABOUT VIETNAM: REPORT ON THE UNITED STATES SENATE HEARINGS (F. Robinson & E. Kemp eds. 1966) (analysis by W. Morse; foreword by J. W. Fulbright). On the general importance of congressional hearings, see Black, *Inside a Senate Investigation*, 172 HARPER'S MONTHLY 275, 285–86 (1936).

[205] The holding in *Gravel* arguably does not undermine a congressman's obligation to inform his colleagues, since the specific holding is limited to "private" publication and not to congressionally authorized publications, which would include the *Congressional Record*. *See* Gravel v. United States, 408 U.S. 606, 626 & n.16 (1972). But the logic of the Court's holding may lead to the conclusion that even statements inserted in the *Record* are not privileged, since publication of proceedings in the *Record* may serve to inform constituents no less than Senator Gravel's publication of the subcommittee record, and the Senator's action arguably also served to inform congressional colleagues no less than the *Record*. And logically, official authorization to "republish" should not affect the scope of the privilege. *See* pp. 1166–69 *infra*. But even if the privilege is held to apply to the *Record*, its publication does not obviate the effect of the decision in cutting off congressmen from their constituents. The *Record* has a very limited circulation, and most congressmen necessarily rely upon "private" publications and speeches outside the Capitol to inform their constituents. *See* pp. 1150–51 & notes 192–95 *supra*; p. 1168 & note 274 *infra*. Furthermore, congressmen do not enjoy an unlimited right to insert matters into the *Record*; a congressman must obtain the unanimous consent of his house in order to place a statement in the *Record*. Conversation with Murray Zweeben, Assistant Parliamentarian, United States Senate, April 19, 1973. On April 25, 1972, Senator Gravel asked for unanimous consent to insert into the *Record* a copy of National Security Study Memorandum No. 1, which contained analyses by the Defense Department, the State Department and the Central Intelligence Agency concerning the feasibility and likely consequences of an executive decision

The conflict over the informing function which was raised in the *Gravel* case is certainly not novel. Past disputes over the scope of legislative privilege have also centered on this very issue; the factual similarity of the *Gravel* case with the precedents of congressmen Cabell [206] and Lyon [207] in this country and Sir William Williams [208] in England is readily apparent. All involved attempts by legislators to inform their constituents of corruption or maladministration in the executive branch. The central purpose of the speech or debate privilege — to protect legislative functions in the system of separate powers — requires that attempts by the executive to stifle such communication between the people and their representatives in Congress should not be entertained in the courts; the contrary result, to quote Jefferson, would be "to leave us, indeed, the shadow, but to take away the substance of representation." [209]

2. Acquisition of Information. — The same considerations which dictate that publications of legislative proceedings should be privileged, should apply in equal or even greater force to the acquisition of information for use in legislative proceedings. In order to propose legislation, debate and vote intelligently, and inform the people about the workings of government, congressmen must first be able to inform themselves.[210] There are two primary

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to bomb Hanoi and Haiphong and to mine the North Vietnamese harbors. Senator Griffin (R. Mich.) objected, 118 Cong. Rec. S 6579–81 (daily ed. April 25, 1972), and it was decided to resolve the matter in an executive session of the Senate. The session, held on May 2, 1972, lasted for 6½ hours, and it was ultimately decided, informally, that Senator Gravel would not place the memorandum in the *Record* and that a specially appointed committee would give the matter further study. The preceedings of the executive session were subsequently published in 118 Cong. Rec. 7393–7427 (daily ed. May 5, 1972).

[206] *See* pp. 1140–42 & notes 145–53 *supra.*

[207] *See* pp. 1142–44 & notes 154–70 *supra.*

[208] *See* pp. 1129–33 & notes 74–107 *supra.*

[209] 8 Works of Thomas Jefferson 326 (Ford ed. 1904). *See* note 150 *supra.*

[210] As Dean Landis has emphasized:

> It needed no argument for Montesquieu to conclude that a knowledge of the practical difficulties of administration was a *sine qua non* of wise legislative activity. But such knowledge is not an *a priori* endowment of the legislator. His duty is to acquire it, partly for the purposes of further legislation, partly to satisfy his mind as to the adequacy of existing laws. Yet the ultimate basis for the duty is the broader presupposition of representative government that the legislator is responsible to his electorate for his actions. Responsibility means judgment, and judgment, if the word implies its intelligent exercise, requires knowledge. The electorate demands a presentation of the case; it requires, even though its comprehension be limited by its capacity, the chaos from which its representative has claimed to have evolved the order that betokens progress. The very fact of representative government thus burdens the legislature with this informing function. Nevertheless its first informing function lies to itself, a necessary corollary of any legislative purpose. Knowledge of the detailed administration of existing laws is not merely permissive to Congress; it is obligatory.

Landis, *Constitutional Limitations on the Congressional Power of Investigation*, 40

methods for doing so. Legislators can subpoena witnesses, a method held to be a privileged "legislative act" in *Dombrowski v. Eastland*.[211] And legislators can also receive information from informal, voluntary sources. These sources not only provide direct information to congressmen, but often make possible the receipt of information through subpoenas. A congressman cannot subpoena material unless he has enough threshold information to know where, to whom, or for what documents he should direct a subpoena. The acquisition of knowledge through informal sources is a necessary concomitant of legislative conduct and thus should be within the ambit of the privilege so that congressmen are able to discharge their constitutional duties properly.[212]

It is especially important that acquisition of information be privileged when the subject of congressional inquiry is executive decisionmaking and when executive errors and misjudgments are more apt to be hidden. As Mr. Justice Brennan observed: "Corrupt and deceitful officers of government do not often post for public examination the evidence of their own misdeeds." [213] The informal sources of information from leaks and volunteers are particularly vital in view of the security classification system and the growing assertion of "executive privilege," by which the executive may refuse to supply Congress information which is crucial to its decisionmaking.[214] The necessity for obtaining information from the executive also influences the allocation of power among the branches of government. If the executive can cut Congress off from relevant sources of information, it can expand its powers into areas vested by the Constitution in the

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HARV. L. REV. 153, 205–06 (1926). *See also* McGrain v. Daugherty, 273 U.S. 135, 174–75 (1927).

The primary reason for the development and reliance upon committees in each house was to further congressional self-education. *See generally* W.L. MORROW, CONGRESSIONAL COMMITTEES (1969); Landis, *supra*. *See also* note 178 *supra*. Furthermore, when the Court held in Tenney v. Brandhove, 341 U.S. 367, 377 & n.6 (1951), that committee deliberations are privileged, it appeared to rely on the necessity of Congress' ability to inform itself.

[211] 387 U.S. 82 (1967). A complaint against Senator Eastland for allegedly subpoenaing documents in violation of the fourth amendment was dismissed on the basis of his speech or debate privilege.

[212] This was the conclusion reached by Sir Gilbert Campion, the legal expert for the House of Commons select committee which was appointed in response to the Duncan Sandys incident, *see* note 178 *supra*. REPORT FROM THE SELECT COMMITTEE ON THE OFFICIAL SECRETS ACTS (1939). However, the committee itself stated, without explanation, that the receipt of information by a Member of Parliament was not privileged. *Id.* at 11. One can speculate about the extent to which the committee was influenced by the outbreak of World War II shortly before its report was issued.

[213] Gravel v. United States, 408 U.S. 606, 663 (1972) (Brennan, J., dissenting).

[214] *See, e.g., id.* at 637–46 (Douglas, J., dissenting).

legislative branch. There can perhaps be no better example of such potential usurpation of functions, and of the attendant disastrous results, than the history of the American involvement in the Indochina War. It is ironic that perhaps the most important revelation of the Pentagon Papers was the ease with which the executive was consistently able to manipulate a Congress kept ignorant of pertinent but distasteful information.[215]

Yet in *Gravel* the Supreme Court held sua sponte[216] that Senator Gravel's receipt of the Pentagon Papers was not immune from extra-legislative inquiry. In discussing the scope of the protective order issued by the court of appeals, the majority said, almost in passing: [217]

> Neither do we perceive any constitutional . . . privilege that shields Rodberg, any more than any other witness, from grand jury questions relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions.

This statement is not at all clear. On its face, the Court did not specifically hold that acquisition was not a "legislative act," but that inference is inevitable.[218] For if acquisition is a legislative act, then any questioning about it perforce will "implicate" privileged conduct.

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[215] *See also* No More Vietnams? The War and the Future of American Foreign Policy (Pfeffer ed. 1968).

[216] Since the court of appeals had held that Senator Gravel's acquisition of the Pentagon Papers was privileged, *see* United States v. Doe, 455 F.2d 753, 758–59 (1st Cir. 1972), and since the Solicitor General did not seek review of this ruling in his petition for certiorari, the issue was not discussed in the briefs. United States' Petition for Certiorari at 2, Gravel v. United States, 408 U.S. 606 (1972). During oral argument, in response to questions from Mr. Justice Marshall, the Solicitor General conceded the correctness of the lower court's ruling. *See* Gravel v. United States, 408 U.S. 606, 632 n.4 (1972) (Stewart, J., dissenting).

[217] 408 U.S. at 628–29.

[218] *But see* Dowdy v. United States, No. 72–1614 (4th Cir., March 12, 1973), where the court read *Gravel* as immunizing the "gathering [of] information in preparation for a possible subcommittee investigatory hearing." *Id.* at 27. According to the *Dowdy* court, the *Gravel* decision merely articulated two exceptions to the immunity: (a) "if [inquiry] proves relevant to investigating possible third party crime," and (b) if the congressman's act is itself criminal. *Id.* at 28 n.20, *citing* Gravel v. United States, 408 U.S. 606, 629 (1972). But the purpose of the privilege is inconsistent with the existence of such "exceptions." As the *Dowdy* court itself said, once it is determined that a legislative function is "apparently being performed, the propriety and motivation for the action taken, as well as the detail of the acts performed, are immune from judicial inquiry." Dowdy v. United States, *supra* at 33. Ad hoc inquiry into whether a specific exception is factually present negates the concept of privilege, particularly when, as here, the exceptions are so broad as to swallow the privilege.

The principle articulated in the *Gravel* opinion was that the privilege extends to matters beyond pure speech or debate "only when necessary to prevent indirect impairment of [congressional] deliberations." [219] We believe this standard is far too narrow if it excludes from the ambit of the privilege practices such as the publication of legislative activities which serve to enlighten the electorate. Arguably, the standard does protect the informing function, since an informed public is vital to effective congressional deliberations,[220] and curtailment of the informing function would at least indirectly impair such deliberations. But acquisition certainly should be privileged under the Court's standard. Acquisition of information by congressmen and committees is essential to intelligent deliberation on important issues by Congress. "To deny Congress power to acquaint itself with facts is equivalent to requiring it to prescribe remedies in darkness." [221] Indeed the court of appeals, from which the Supreme Court adopted its purported standard as to the scope of the clause, had little difficulty in concluding that Senator Gravel could not be questioned about his acquisition of the Pentagon Papers.[222] It is thus apparent either that the actual standard applied by the Court is narrower than the one stated in the opinion or that the articulated standard was applied in little more than a result-minded manner.

It is possible, however, that the Court's summary disposition of the acquisition issue in Gravel was seen by the majority as being dictated, a fortiori, by that same majority's rejection — in *Branzburg v. Hayes* [223] — of the claim of newspapermen of the right to preserve the confidentiality of sources. But for several reasons, that decision is not dispositive of a congressman's claim that the speech or debate clause encompasses acquisition of information. First, the claim of congressional privilege rests upon a different basis than the claim of privilege for the press — the latter is premised entirely upon the assertion that permitting the interrogation of newspapermen about information given to them by confidential sources will dry up those sources and thereby diminish the amount of information available to the public. The reporter's claim of privilege is thus entirely derived from the rights of the people to be informed. While congressmen do serve the function of enlightening the public by disseminating information,

[219] 408 U.S. at 625, *quoting* United States v. Doe, 455 F.2d 753, 760 (1st Cir. 1972).

[220] *See* pp. 1149–50 & notes 190–91 *supra*.

[221] Landis, *supra* note 210, at 209.

[222] United States v. Doe, 455 F.2d 753, 758–59 (1st Cir. 1972).

[223] 408 U.S. 665 (1972). This decision was handed down the same day as *Gravel*; Mr. Justice White wrote both majority opinions.

they must also obtain information for use in formulating laws. Thus, if key sources of confidential information are chilled, the very functioning of Congress itself is jeopardized. Second, the Supreme Court majority in *Branzburg* expressed fear that the privilege being asserted was incapable of limitation — that is, it would be impossible to determine who was or was not a bona fide newsman; and lurking in the background were other groups, including scholars and authors, seeking similar protection.[224] In contrast, congressmen comprise a relatively small, well-defined group, which is singled out for unique protection by the speech or debate clause. Third, as we have emphasized, the claim of confidentiality by congressmen is especially compelling in their acquisition of information concerning the executive branch, and this raises important considerations of separation of powers not so directly encountered in the newsman's situation.[225]

B. The Bribed Congressman — Inquiry into Motives for Speeches and Votes

Former Senator Brewster was indicted under federal bribery and conflict-of-interest statutes which are specifically applicable to members of Congress.[226] The five counts of the indictment charged Brewster with soliciting and receiving sums of money in return for "official acts performed by him in respect to his action, vote and decision" on proposed postal rate legislation.[227]

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[224] *Id.* at 703–05. For a lower court decision rejecting a scholar's claim that he had a right under the first amendment to protect the confidentiality of his sources, see United States v. Doe, 332 F. Supp. 938 (D. Mass. 1971).

[225] A fourth distinction derives from the different tests applied in first amendment and privilege cases. The absolutist approach of Justices Black and Douglas in first amendment cases — that privileged speech will not yield to subordinate governmental interests — has never commanded a majority of the court. The majority in *Branzburg* recognized that news gathering was entitled to some first amendment protection but held that this was outweighed by the government's interest in securing information relevant to alleged crimes. Branzburg v. Hayes, 408 U.S. 665, 681–82, 686–88 (1972). The speech or debate privilege, on the other hand, has always been considered to afford "an absolute privilege . . . in respect to any speech, debate, vote, report or action done in session." Barr v. Matteo, 360 U.S. 564, 569 (1959). *See also* Powell v. McCormack, 395 U.S. 486, 503 (1969); Dombrowski v. Eastland, 387 U.S. 82, 84–85 (1967); Cochran v. Couzens, 42 F.2d 783 (D.C. Cir.), *cert. denied*, 282 U.S. 874 (1930). Thus, a determination that acquisition was protected by the speech or debate clause would mean that executive appeals for more effective criminal law enforcement could not be entertained.

[226] 18 U.S.C. § 201(a), (c)(1)–(2), (g) (1970).

[227] United States v. Brewster, 408 U.S. 501, 502–04 (1972). Senator Brewster was charged in five counts of a ten count indictment. Four of the counts charged him with violation of 18 U.S.C. § 201(c)(1)–(2) (1970), which provides:

> Whoever, being a public official or person selected to be a public official, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts,

It is apparent that accepting a bribe is not a legislative act; it could not seriously be contended that such an activity is necessary to further any legitimate goal of representative government. On the contrary, bribe taking seriously subverts the legislative process. It might therefore appear that the "bribed congressman" situation in the *Brewster* case presents completely different considerations than the "informing congressman" situation in the *Gravel* case.

However, speech or debate clause problems arise when the alleged bribery is intertwined, as in *Brewster*, with the performance of a privileged act.[228] In *United States v. Johnson*,[229] Mr. Justice Harlan stated that the essence of such a charge is simply that privileged activity was corruptly motivated; and the Court held that such motivation could not be made "the basis of a criminal charge against a member of Congress." [230] In reaching this conclusion, Justice Harlan laid great stress upon the prophylactic purposes of the clause, emphasizing that it should be construed broadly in order "to prevent intimidation by the executive and accountability before a possibly hostile judiciary." [231] The thrust of this argument seems to be that executive and judicial inquiry into a congressman's motivation puts him at the mercy of the other branches, and there is no guarantee that their definition of evil will not encompass the vociferous opponent as well as the bribed congressman.[232]

At least on its face, this argument is not fully satisfactory. A

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receives, or agrees to receive anything of value for himself or for any other person or entity, in return for: (1) being influenced in his performance of any official act; or (2) being influenced to commit or aid in committing, or to collude in, or allow, any fraud, or make opportunity for the commission of any fraud, on the United States . . .

. . .

Shall be fined not more than $20,000 or three times the monetary equivalent of the thing of value, whichever is greater, or imprisoned for not more than fifteen years, or both, and may be disqualified from holding any office of honor, trust, or profit under the United States.

18 U.S.C. § 201(d)–(e) (1970). A fifth count of the indictment charged Senator Brewster with violating 18 U.S.C. § 201(g), which prohibits public officials from accepting payment in return for performance of an official act. 18 U.S.C. § 201(a) specifically defines "public official" to include a member of Congress.

[228] If a congressman is indicted for accepting a bribe to commit a nonlegislative act (*e.g.*, intervening before an executive agency, *see* pp. 1163–64 *infra*), no problem of privilege exists.

[229] 383 U.S. 169 (1966).

[230] *Id.* at 180.

[231] *Id.* at 181–82.

[232]

In times of political passion, dishonest or vindictive motives are readily attributed to legislative conduct and as readily believed. Courts are not the place for such controversies. Self-discipline and the voters must be the ultimate reliance for discouraging or correcting such abuses.

Tenny v. Brandhove, 341 U.S. 367, 378 (1951) (footnote omitted).

major objective of the privilege is to give practical security to legislators who criticize executive administration of domestic and foreign policy. Unlike investigations concerning the publication and acquisition of information,[233] a bribery prosecution does not normally involve disputes between the branches over the effective scope of their respective functions. Nor may it be sufficient to speculate that an ill-willed executive will selectively employ bribery prosecutions against outspoken legislative critics who are constitutionally immune from more direct threats. If the executive wishes to harass a congressman, it has many other means available, including use of the grand jury and an arsenal of law enforcement and investigatory agencies.[234] Since the ability of the executive to harass and prosecute congressmen for activities unrelated to the legislative process has not evoked fears of widespread executive intimidation, the independence or integrity of Congress would hardly appear to be jeopardized if the "bribed congressman" does not enjoy immunity from prosecution.[235]

However, the threat to legislative independence becomes clearer when the focus is shifted to an examination of the problems inherent in the administration of bribery statutes. When

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[233] *See* pp. 1150–55 *supra*.

[234] The grand jury's attempted investigation of Senator Gravel's activities illustrates such potential harassment of a critical legislator. Counsel for the Internal Security Division suggested before the district court that Senator Gravel himself could be subpoenaed, at which time he could invoke his fifth amendment privilege against self-incrimination. Record at 8, Gravel v. United States, 408 U.S. 606 (1972). Only after the district court issued its protective order did the Justice Department for the first time state that an indictment against Senator Gravel was "not probable." *Id.* at 127–28. Throughout the proceedings, the Justice Department offered no reason for the grand jury investigation. One instance in the Supreme Court proceedings is suggestive of the use of the investigation for harassment. Certiorari was granted on February 22, 1972, Gravel v. United States, 405 U.S. 916 (1972), which was too late, under the usual time limits for filing briefs, for oral argument during that term. The Solicitor General filed a motion to expedite consideration, claiming that the grand jury was being paralyzed by the stay and that "important evidence" relating to the Ellsberg trial, *see* note 12 *supra*, might somehow be withheld if Rodberg's testimony could not be obtained. The latter assertion was directly contrary to the Justice Department's assertion before the First Circuit that it was not using the Boston grand jury to gather more evidence against Ellsberg, who had already been indicted in Los Angeles. *See* United States v. Doe, 455 F.2d 1270 (1st Cir. 1972).

In any event, the Supreme Court granted the motion to expedite, Gravel v. United States, 405 U.S. 972 (1972), and a decision favoring the Justice Department was rendered on June 29, 1972. Gravel v. United States, 408 U.S. 606 (1972). Having thus proved its point, the Justice Department declined to send new grand jury subpoenas to Rodberg, Webber, Stair or anyone else connected with Gravel. *See* note 20 *supra*.

[235] *See* Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335, 348 (1965).

members of the executive and judicial branches accept money from private interests and then support those interests, a strong inference of unethical and illegal conduct arises. But because of their unique representative status, the same cannot be said of congressmen. Members of Congress owe a certain amount of loyalty to their constituents; at the same time, they rely upon gifts in the form of campaign contributions to finance the constantly escalating costs of travel expenses and political campaigns. Forced to satisfy their own needs as well as to serve the interests of their constituents, congressmen often incur the favor of special-interest groups by proposing and voting for certain legislation; in return for this support, congressmen often receive generous campaign contributions. This may reflect a community of interest, or expectations on both sides, or it may be an outright bribe.[236] The interplay of congressmen and their constituents is rarely publicized by either; the circumstances would often permit a grand jury, led perhaps by an unfriendly United States Attorney, to issue an indictment on the basis of ambiguous evidence.[237]

The absence of ascertainable standards for distinguishing legitimate from illegitimate congressional motives reduces the en-

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[236] This argument was well expressed by the Association of the Bar of the City of New York:

> In fundamental respects, however, the congressional problem differs from that of the executive. It is too easy to say glibly that rules governing the administrator should govern the legislator. The congressman's representative status lies at the heart of the matter. As a representative, he is often supposed to represent a particular economic group, and in many instances his own economic self-interest is closely tied to that group. That is precisely why it selected him. It is common to talk of the Farm Bloc, or the Silver Senators. We would think odd a fishing state congressman who was not mindful of the interests of the fishing industry — though he may be in the fishing business himself, and though his campaign funds come in part from this source. This kind of representation is considered inevitable and, indeed, generally applauded. Sterile application of an abstract rule against acting in situations involving self-interest would prevent the farmer senator from voting on farm legislation or the Negro congressman from speaking on civil rights bills. At some point a purist attitude toward the evils of conflicts of interest in Congress runs afoul of the basic premises of American representative government.
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> Furthermore; no member of Congress can subsist on his government salary. Forced to keep his base and to spend time in his home district, he unavoidably incurs heavy and regular travel expenses. Campaign costs soar as campaign techniques turn to mass communication media. And the congressman must always be prepared to sail on the next ebb of the political tide. These facts, taken together with the myth that membership in Congress is still a part-time job, ensure that congressmen will keep up their outside economic connections, and that they will insist upon the necessity and justice of their doing so.

Special Committee on the Federal Conflict of Interest Laws, The Association of the Bar of the City of New York, Conflict of Interest and Federal Service 14–15 (1960).

[237] *See* Regina v. Bunting, 7 Ont. 524, 564–65, 568–69 (1885) (O'Connor, J., dissenting); Brief for Senator Brewster at 68–72, United States v. Brewster, 408 U.S. 501 (1972); 78 Harv. L. Rev. 1473, 1475–76 (1965).

forcement of bribery statutes to subjective judicial perceptions on an ad hoc basis. The use of these statutes in cases where the charge of bribery is intertwined with privileged activity may have a detrimental impact upon the untrammeled functioning of the legislative process, because the inability of congressmen to know for certain the range of disallowed activities will tend to diminish their willingness to perform their legislative functions without inhibition.[238] And this danger is magnified by the possibility that bribery statutes will be applied selectively against congressmen whose rapport with the White House may be less than ideal.[239]

In denying Senator Brewster's claim of immunity, the Supreme Court did not suggest the existence of ascertainable standards for judging the propriety of his motives nor, assuming the absence of such criteria, did it examine the effect such trials might have upon the legislative process. Instead, accepting a belated suggestion of the Solicitor General,[240] the majority held that the

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[238] This ambiguity may well support an independent constitutional challenge on grounds of vagueness, either as a matter of due process or by analogy to the application of the vagueness doctrine in first amendment cases. Since a definition of impermissible activity appears impossible to construct, the bribery statutes put too much discretion in the hands of prosecutors and courts, thus "chilling" the legislator's exercise of his freedom of speech and debate. *See generally* Note, *The Void-for-Vagueness Doctrine in The Supreme Court*, 109 U. Pa. L. Rev. 67 (1960). On the invalidity of broad delegations of discretion in the free speech area, *see, e.g.*, Shuttlesworth v. City of Birmingham, 394 U.S. 147 (1969).

[239] Much of our present law on the speech or debate clause may be traced to the efforts of a former United States Attorney, Stephen A. Sachs, who prosecuted both Representative Johnson and Senator Brewster. Sachs also obtained a bribery indictment and was appointed special prosecutor against Representative Dowdy (D., Tex.), who was subsequently convicted. United States v. Dowdy, No. 72–1614 (4th Cir., March 12, 1973). We certainly do not imply that any of these prosecutions were politically motivated. Sachs enjoys a well-deserved reputation for honesty and nonpartisanship; moreover, he is a Democrat, as are all three of the congressmen. Yet even this example does not mitigate the dangers of selective prosecution by more partisan prosecutors; when Sachs secured bribery indictments against congressmen who enjoyed political favor in the White House, Attorney General Mitchell ordered Sachs not to sign the indictments and the cases were dismissed. *See* N.Y. Times, May 29, 1970, at 1, col. 1.

[240] The Solicitor General's petition for certiorari and original brief focused entirely upon an issue which had been left open in *Johnson*: whether Congress might enact a narrowly drawn statute which would criminalize bribetaking by legislators and authorize the executive to prosecute and the court to try the offending congressman. United States v. Johnson, 383 U.S. 169, 185 (1966). This raises the key issue of whether a member's individual privilege may be divested by decision of his house or by Congress as a whole, which is discussed *infra*, pp. 1164–71. The *Brewster* Court did not decide the divestment issue and relied instead upon a new argument — that bribetaking is not a legislative activity — raised by the Solicitor General for the first time in the Supplemental Memorandum for the United States on Reargument at 3–8, United States v. Brewster, 408 U.S. 501 (1972).

bribery indictment could be prosecuted successfully without inquiry into either legislative acts or their motivation. The majority reasoned: [241]

> The question is whether it is necessary to inquire into how appellee spoke, how he debated, how he voted, or anything he did in the chamber or in committee in order to make out a violation of this statute. The illegal conduct is taking or agreeing to take money for a promise to act in a certain way. There is no need for the Government to show that appellee fulfilled the alleged illegal bargain; acceptance of the bribe is the violation of the statute, not performance of the illegal promise.
>
> Taking a bribe is, obviously, no part of the legislative process or function; it is not a legislative act. . . . Nor is inquiry into a legislative act or the motivation for a legislative act necessary to a prosecution under this statute or this indictment.

As with the *Gravel* holding on acquisition,[242] this statement is not very clear, because the Court did not explain how inquiry into a legislative act or its motivation is possibly avoidable. If a congressman decides to give a speech or cast a vote a certain way and he is indicted for having done so corruptly — as a result of a bribe — his motivation for the legislative activity is being called into question by the charge.[243] Nor would it matter that he did not even speak or vote. The decisionmaking process by which a congressman decides to speak or vote, or to remain silent or abstain, would seem to be as much a legislative act as a speech or vote itself. An indictment for exercising that decision improperly directly challenges this decisionmaking process.[244] The holding in *Brewster* thus must be that this basic decisionmaking process is not privileged and is thus subject to executive and judicial inquiry. Such a holding is, of course, consistent with the holding in *Gravel* that receipt of documents for use in congressional deliberations is likewise subject to extra-legislative restraint and sanctions.[245]

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[241] United States v. Brewster, 408 U.S. 501, 526 (1972).

[242] *See* pp. 1155–57 *supra*.

[243] Nor did the Court explain how this holding is consistent with the language of the statute, since 18 U.S.C. § 201 (c)(1)–(2) (1970) at no place mentions the word "promise." It says that no public official may accept anything of value in return for "being influenced in his performance" of an official act. *See* note 227 *supra*. The Court may have misconstrued the statute in order to save the indictment. *See* United States v. Brewster, 408 U.S. 501, 535–36 (1972) (Brennan, J., dissenting).

[244] *See Ex parte* Wason, L.R. 4 Q.B. 573, 576 (1869).

[245] It is difficult to reconcile Mr. Justice White's dissenting opinion in *Brewster* with his holding in *Gravel* that preparatory activity such as acquisition is not privileged. Justice White distinguished the preparatory acts in *Gravel* as being "criminal in themselves." United States v. Brewster, 408 U.S. 501, 555 n.* (1972) (dissenting opinion) (the footnote is marked only by an asterisk). There are

Taken together, the decisions establish that a congressman is immune from questioning about his speeches, debates and votes, but that he is accountable to the executive and judicial branches for his conduct in preparing his speeches, deciding how to vote, and telling the people why he spoke and voted as he did. One might conclude, with Mr. Justice Brennan's dissent in *Gravel*, that this result "so restricts the privilege of speech or debate as to endanger the continued performance of legislative tasks that are vital to the workings of our democratic system." [246]

C. Intervention Before Executive Agencies

In *United States v. Johnson*,[247] Justice Harlan stated in dictum that congressmen who intervene before executive agencies on behalf of their constituents do so at their own risk: [248]

> No argument is made, nor do we think that it could be successfully contended, that the Speech or Debate Clause reaches conduct, such as was involved in the attempt to influence the Department of Justice, that is in no wise related to the due functioning of the legislative process.

Yet the issue is more difficult than this casual disposition would indicate.[249] It may be argued that there is a congressional role akin to that of an ombudsman with respect to executive agencies. With the tremendous growth of these federal agencies and the mushrooming number of bureaucrats, there is much to be said for members of Congress using their influence to protect constituents from injustice.[250] And the positive effects of such intervention on the workings of government go beyond relief for individual constituents who feel helpless when confronted with a gigantic bureaucracy; the intervening legislator is also in a position to help administrators keep in touch with popular opinion con-

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three problems with this distinction: (1) accepting a bribe is also a criminal act in itself; (2) the privilege, by definition, protects both legal and illegal activity; and (3) it is hardly clear that merely receiving classified documents violates any criminal statute. *See* note 218 *supra*. The last point is now being litigated in the trial of Daniel Ellsberg and Anthony Russo. *See* note 12 *supra*.

[246] Gravel v. United States, 408 U.S. 606, 648 (1972) (Brennan, J., dissenting).

[247] 383 U.S. 169 (1966).

[248] *Id.* at 172.

[249] *See* Note, *The Scope of Immunity for Legislators and Their Employees*, 77 YALE L.J. 366, 372, 384 (1967); Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335, 336, 346 (1965).

[250] *See, e.g.*, E. GRIFFITH, CONGRESS: ITS CONTEMPORARY ROLE 79 (4th ed. 1967); B. GROSS, THE LEGISLATIVE STRUGGLE: A STORY IN COMBAT 140–41 (1953); SPECIAL COMMITTEE ON THE FEDERAL CONFLICT OF INTEREST LAWS, THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, CONFLICT OF INTEREST AND FEDERAL SERVICE 16 (1960).

cerning the activities of their agency.[251] In addition, studies of Congress attest generally to the fairly widespread nature of legislative intervention before executive agencies.[252]

While these arguments in support of the usefulness of intervention seem to us persuasive, there are countervailing considerations. Many congressmen believe that the practice is at least ethically questionable, since the line between legitimate assistance of constituents and illegitimate influence peddling is exceedingly narrow.[253] Legislative proposals have been introduced to curb the practice, and a substantial number of congressmen do not go beyond sending a letter of inquiry to the agency.[254]

While some controversy thus surrounds the question of the propriety of intervention, that question need not be resolved when one analyzes the scope of the speech or debate clause in terms of its purpose — preservation of the system of separation of powers. The usefulness or even commonness of such intervention is not alone a sufficient index of the scope of the privilege. Historical redefinition of the privilege has consistently described its parameters not according to general notions of public policy, but according to the function of legislative prerogatives in the scheme of separate powers. Even if intervention by individual congressmen is useful and ethical, whether it is a proper "legislative function" is open to serious question. It is arguable that such intervention breaches separation of powers because it involves direct interference with matters committed by law for resolution by a coordinate branch of government. It would hardly be thought consonant with separation of powers for a congressman to intercede before a judge who was deciding the case of a constituent; on principle, the same may be true with regard to intervention before the executive branch. If a congressman does believe that an injustice has been committed by an executive agency (or, for that matter, by a court), he has adequate legislative tools at his disposal: he may hold hearings, expose the injustice and introduce remedial legislation. On balance, therefore, it would appear that Justice Harlan was correct in indicating that personal intervention before executive agencies would not fall within the ambit of the protection of the speech or debate clause.

D. Divestment of the Privilege

Although neither case was explicitly decided on this issue, in both *Gravel* and *Brewster* the Justice Department argued that

[251] *See* E. Herring, The Politics of Democracy: American Parties in Action 383 (1940).

[252] *E.g.*, J. Bibby & R. Davidson, On Capitol Hill 15–16 (1967).

[253] *Cf.* Subcomm., Senate Committee on Labor and Public Welfare, Ethical Standards in Government, 82d Cong., 1st Sess. 19–30 (Comm. Print 1951).

[254] *See* G. Galloway, The Legislative Process in Congress 202–05 (1953).

each Senator's privilege was divested because of an asserted conflict with congressional practice, rules or statutes. In *Gravel*, the Justice Department originally claimed that the speech or debate clause did not protect any of the Senator's actions because the subcommittee meeting was allegedly "unauthorized" by the Senate rules, since the subject matter of the inquiry was said to be beyond the jurisdiction of the subcommittee.[255] This claim — that the hearing was an "irregular" or "nongermane" activity and thus not a "legislative function" — was rejected by the district court and was not pursued in the higher courts.[256] However, the divestment theory enjoyed more success when applied not to the lack of authorization for the committee meeting, but to the lack of authorization for the publication of its record. In both the court of appeals and the Supreme Court, the Justice Department stressed that such publication was not privileged because a private printer had been used and the full committee had not authorized the publication.[257] Combining the "irregularity" and "nongermaneness" themes, the court of appeals [258]

> dr[ew] a distinction between normal and customary republication of a speech in Congress and republishing privately all or part of 47 volumes of . . . lawfully classified documents, through the device of filing them as exhibits to the records of a subcommittee to which they have no conceivable concern.

The Supreme Court did not explicitly embrace such a distinction, but it did suggest that Senate or committee authorization for the publication might make a difference in determining whether the privilege applied.[259] Similarly, in the *Brewster* case the Justice Department claimed that the Senator's privilege had been divested by a narrowly drawn criminal statute by which Congress gave the courts jurisdiction to try congressmen accused of accepting a

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[255] The Justice Department's argument was that judicial review had often been exercised to control legislative committees which went outside their jurisdiction. Reliance was placed on cases in which the courts refused to hold in contempt of Congress witnesses who had been recalcitrant before legislative committees. *See* United States v. Doe, 332 F. Supp. 930, 935–36 (D. Mass. 1971).

[256] *Id.* at 935. *See also* Gravel v. United States, 408 U.S. 606, 610 n.6 (1972).

[257] This argument was pursued by the Solicitor General, who asserted that the chairman of the parent committee "apparently recognized that the republication was not necessary or appropriate to the proper performance of any legislative function, since he refused to authorize it." Brief for the United States at 42, Gravel v. United States, 408 U.S. 606 (1972). Actually, as Senator Dole stated on the floor of the Senate, the committee chairman, Senator Randolph, had not refused to authorize the republication, 118 Cong Rec. S 4620 (daily ed. March 22, 1972), and the district court refused to so find. Record at 88–89, Gravel v. United States, 408 U.S. 606 (1972).

[258] United States v. Doe, 455 F.2d 753, 759–60, 762 (1st Cir. 1972).

[259] Gravel v. United States, 408 U.S. 606, 626 (1972).

bribe in return for a favorable speech or vote.[260] This issue was left open by the Supeme Court majority,[261] although the three dissenters rejected the claim.[262]

While each of these positions advanced by the Justice Department is somewhat different, they basically involve the same question: whether the validity of a congressman's assertion of legislative privilege depends upon the approval or disapproval of his house.[263] For two reasons, it should not. First, Congress should not be able to collectively circumscribe the constitutional rights of its individual members. The earliest American case to address the question — concerning a state constitutional provision analogous to the speech or debate privilege — held that because the privilege was personal to each legislator, the prohibition against executive and judicial inquiry into the exercise of legislative acts does not depend upon "whether the exercise was regular according to the rules of the house, or irregular and against their rules." [264] At most, legislative actions without house approval should subject a congressman to disciplinary actions by his colleagues; but such actions should not remove a congressman's personal constitutional rights.

Second, the rules of each house or "germaneness" and "regularity" do not define or set bounds upon the limits of the legislature's functions. These rules are established for the convenience and efficiency of each house, to allocate the exercise of these functions among its members and its committees. But whether a function is performed by the member to whom it has been delegated or by another member should not alter its character as a legislative function.[265] And it is the characterization of an activity as a legislative function which brings it within the scope of the speech or debate privilege. Similarly, whether rules of procedure

[260] This was the only argument made by the Justice Department in its brief. After the case was set down for rehearing, the Justice Department argued that the indictment could be proven without inquiry into any legislative act. The Supreme Court accepted the latter proposition, and the divestment issue was avoided. *See* pp. 1160–61 & note 240 *supra*.

[261] United States v. Brewster, 408 U.S. 501, 529 n.18 (1972).

[262] *Id.* at 540–49 (Brennan, J., joined by Douglas, J.), 562–63 (White, J., joined by Douglas and Brennan, J.J.).

[263] This discussion assumes *arguendo* that approval or disapproval of the house may be inferred by comparing a congressman's actions with statutes or rules. *But cf.* note 272 *infra*.

[264] Coffin v. Coffin, 4 Mass. 1, 27 (1808). This passage was quoted with approval in Kilbourn v. Thompson, 103 U.S. 168, 203 (1880). *See also* note 277 *infra*.

[265] The district court in *Gravel* implicitly recognized this point in rejecting the Justice Department's argument of nongermaneness: "It has not been suggested . . . that the war in Vietnam is an issue beyond the purview of congressional debate and action." United States v. Doe, 332 F. Supp. 930, 936 (D. Mass. 1971). *See also* Dowdy v. United States, No. 72–1614 (4th Cir. March 12, 1973), at 33.

are adhered to or violated has no bearing upon the character of the function being performed.[266]

Conversely, the mere imprimatur of a committee or the full house should not give constitutional protection to an otherwise unprivileged act. As with all other constitutional provisions, the contours of the speech or debate clause are ultimately established by judicial decision and not by legislative fiat. If an act of a congressman is *ab initio* unrelated to the proper functioning of the legislative process, a simple approval by the house should not magically transform it into a legislative act.[267] Furthermore, the logic of a contrary conclusion would hold that the privilege protects only those congressmen who are in accord with the majority sentiment. In terms of separation of powers, it may be more important to protect dissenters, especially when a majority of the Congress supports the executive.

The use of germaneness and regularity standards by the courts in determining the applicability of the privilege in individual cases is thus inconsistent with both the individual nature and the functional definition of the privilege. Of course such use may also be barred by an argument extrinsic to the speech or debate clause, that the judiciary does not have the authority to enforce house rules.[268] The assertion that a congressman may be disciplined by the executive and judiciary for otherwise privileged conduct because he violated the practices of his house necessarily presupposes that these branches have some general power to oversee the internal rules of the legislative branch.[269] But Congress' power in article I, section 5 to make and enforce rules for its proceedings is a "textually demonstrable constitutional commit-

[266] For example, Rule XIV (2) of the Rules of the House of Representatives imposes a general 1 hour time limit on individual floor speeches. Rule XIV (2), in L. Deschler, Constitution, Jefferson's Manual and Rules of the House of Representatives, H.R. Doc. No. 439, 91st Cong., 2d Sess., § 759, at 416 (1971). In practice, the Senate and House generally limit floor speeches much more severely — to 5 minutes in the House and 15 minutes in the Senate. Conversation with Murray Zweeben, Assistant Parliamentarian, United States Senate, April 19, 1973. If a congressman spoke longer than the time limit, it could not seriously be suggested that his speech was not a legislative function, even if he were disciplined by his house for violation of its rules.

[267] This has been the rule in England at least since Ashby v. White, 92 Eng. Rep. 126 (Q.B. 1702), *rev'd on other grounds*, 1 Eng. Rep. 417 (H.L. 1703). *See also* Stockdale v. Hansard, 112 Eng. Rep. 1112, 1156 (Q.B. 1839).

[268] Such an argument is one aspect of what is known as the "political question doctrine." *See* Baker v. Carr, 369 U.S. 186, 217 (1962).

[269] This argument was in fact made in *Gravel* by counsel for the Justice Department in the district court proceedings. When asked by the court how he proposed to prove that Senator Gravel's actions had violated senatorial rules and practice, counsel replied that he might subpoena Senator Randolf, chairman of the parent committee. Record at 89, Gravel v. United States, 408 U.S. 606 (1972).

ment" [270] and thus precludes general superintendence by the judicial branch.[271] How a house of Congress internally allocates its legitimate legislative functions, in committee and on the floor, is a question which is beyond the general cognizance of the other branches.[272]

With these principles concerning the internal rules of Congress in mind, we can evaluate one possible distinction between *Doe v. McMillan* [273] and *Gravel*. The "republication" sought to be enjoined in *McMillan* was pursuant to committee authorization and with the assistance of the Public Printer; Senator Gravel, on the other hand, did not seek or obtain parent committee approval for "republishing" the subcommittee record and used Beacon Press, a private printer. But such a distinction should have no legal significance. If the informing function is protected by the speech or debate clause, then an exercise of that function should be privileged regardless of the formal technique which an individual congressman uses in discharging it.[274] If, on the other hand, the

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[270] Baker v. Carr, 369 U.S. 186, 217 (1962) (Brennan, J., speaking generally of the political question doctrine).

[271] This is not to say that Congress has exclusive authority under § 5 to discipline its own members in all situations. Activity which is not within the scope of the speech or debate clause (§ 6) may be prohibited by both house rules and criminal statutes, and offending congressmen would then be subject to sanctions by both the house and the judiciary. *See* Burton v. United States, 202 U.S. 344, 367 (1906); Note, *The Bribed Congressman's Immunity from Prosecution*, 75 YALE L.J. 335, 348 & n.83 (1965).

[272] Of course, when the enforcement of a statute depends upon a legislator's adherence to internal rules, judicial inquiry may be proper. For example, when a witness is prosecuted in the federal courts under the contempt of Congress statute, 2 U.S.C. § 192 (1970), for refusal to answer the questions of a committee, the courts may be obliged to examine internal house rules in order to determine whether the committee had jurisdiction of the matter; if it did not there could be no contempt. *See, e.g.*, Watkins v. United States, 354 U.S. 178, 205–06 (1957). Except in a situation of this kind, the issue of jurisdiction is "peculiarly within the realm of the legislature." *Id.* Thus, in Yellin v. United States, 374 U.S. 109 (1963), a recalcitrant witness was found not guilty of contempt because the committee had failed to follow its own rules, but the Court noted that the committee members nevertheless were immune from suit under article I, § 6. *Id.* at 121–22.

[273] 459 F.2d 1304 (D.C. Cir. 1972), *cert. granted*, 408 U.S. 922 (1972). The facts of this case are discussed *supra*, p. 1119.

[274] This point was made forcefully by the Senate in its amicus brief:

> One of these duties, important as any other, is the duty of informing other Members, constituents and the general public, on the issues of the day. This is done in many ways, most of which were not technically possible in 1789. Floor debate and belated newspaper reports were practically the only means available at the time of the founding. Now, there are many means of disseminating information: wire services, radio and television, telephone and telegraph, as well as floor debate, newspapers, books, magazines, newsletters, press releases, committee reports, the *Congressional Record*, and legislative services. In today's hectic and complicated world, the various methods of informing vary in effectiveness. Each Member must decide for himself from time to time which issues require ventilation and what methods to use.

obligation of congressmen to enlighten their constituents is not part of the philosophy of the speech or debate clause, then the clause does not bar judicial inquiry even if the congressman acted pursuant to an order of the house.[275] It may be noted that this conclusion — that the legislature cannot confer a privilege upon an otherwise unprivileged act — was enunciated in *Stockdale v. Hansard*,[276] a decision which was relied upon by the majority in *Gravel*.

For similar reasons, Congress should not be able to divest any of its members of the privilege by a statute authorizing prosecution in the courts. As we have indicated, the privilege is guaranteed to each member personally, and its constitutional protection is not

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It is not for the Executive to challenge nor for the Judiciary to judge a member's choice of issues to publicize or methods of publication regardless of whether they may be considered ill-advised.

Brief of Senate as Amicus Curiae at 6, Gravel v. United States, 408 U.S. 606 (1972).

Furthermore, technological developments in printing have persuaded many congressmen and other public officials to utilize private facilities to disseminate reports and records in order to obtain the cheapest and most widespread distribution. For example, we have been advised by the Library of Congress that the Bantam edition of the Kerner Commission Report had sales of 1,895,000 compared to 65,000 for the Government Printing Office edition (the latter costing three times as much); the sales of private editions of the 1966 Foreign Relations Committee hearings on the Vietnam War totalled 42,000, compared to 6023 for the G.P.O. edition. Senator Gravel's brief lists about 50 recent examples of private publications of House and Senate committee hearings. Brief for Senator Gravel at 86–88, nn.111–119, Gravel v. United States, 408 U.S. 606 (1972). Finally, it should be observed that the Public Printer has not had a status that is different, under either English or American law, from private printers who publish legislative proceedings. *See* Hentoff v. Ichord, 318 F. Supp. 1175, 1180 (D.D.C. 1970); *compare* The Parliamentary Papers Act, 3 and 4 Vict. c. 9 (1840), *with* Wason v. Walter, L.R. 4 Q.B. 73 (1868).

[275] There was a hint in the majority opinion in *Gravel* that the requirement in article I, § 5 that each house keep and publish a "Journal of its Proceedings" might lead to a different result "when Congress or either House, as distinguished from a single member, orders the publication and/or public distribution of committee hearings, reports or other materials." Gravel v. United States, 408 U.S. 606, 626 n.16 (1972). However, the history of this provision shows that it was designed to negate a privilege of secrecy claimed by the House of Commons rather than to create a privilege in either house. *See* p. 1138 *supra*. Moreover, protecting publications in the *Journal* would accomplish little, since the *Journal* generally records only the daily legislative schedule, and the results of votes, speeches and documents are recorded in the *Congressional Record*, which is an unofficial publication not required under § 5.

[276] 112 Eng. Rep. 1112, 1156 (Q.B. 1839). This was a libel suit against the Public Printer who, pursuant to house order, had published and distributed a committee report critical of the management of Newgate Prison. The Queen's Bench held that the mere order of the house could not confer a privilege upon the Public Printer. But a statutory privilege was conferred upon the Public Printer by the Parliamentary Papers Act, 3 & 4 Vict., c. 9 (1840). *See also* pp. 1180–81 & notes 324–34 *infra*.

subject to collective discretion.[277] We have also argued that the scope of the privilege is defined by contemporary legislative functions, and that the definition of a constitutional privilege is the province of the courts, not the Congress. While a congressional decision that specific legislative conduct is a crime does indicate that the majority of Congress does not consider such conduct to be a proper legislative function, and while that decision should no doubt influence the court, it cannot be dispositive of the constitutional question. Congressional judgments on the propriety of legislative activities may well be suspect in some cases. If the Congress passed a law proscribing all floor speeches which in any way criticize the government, there could be little doubt that the proscribed activities would fall within the ambit of the speech or debate privilege.[278] Moreover, Congress may make criminal activity which itself is not a "legislative function," but whose prosecution would necessarily require questioning about legitimate legislative functions.[279] In these situations, the courts should be wary of subjecting individual legislators to sanctions that may be politically motivated and which infringe upon the freedom of legislative deliberation.

Finally, it must be admitted that in some cases wrongdoing may go unquestioned, uninvestigated, or unpunished because the courts will be found to be without jurisdiction over the offense and because the legislature will fail to discipline its members,[280] perhaps for political reasons or out of solicitude for a member. Yet this consequence is inevitable if the speech or debate privilege is to serve its purpose of preserving legislative independence against executive and judicial infringement. It is not very probable that widespread legislative abuses are any more likely to follow contemporary vindication of the privilege than has been true in hundreds of years of English and American history. The occasional instances in which law enforcement is hindered are

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[277] *See* p. 1156 & note 222, *supra*. *See also* Coffin v. Coffin, 4 Mass. 1 (1808).

> [T]he privilege secured by it is not so much the privilege of the House as an organized body, as of each individual member composing it, who is entitled to this privilege, even against the declared will of the house. For he does not hold this privilege at the pleasure of the house, but derives it from the will of the people, expressed in the constitution, which is paramount to the will of either or both branches of the legislature. . . . Of these privileges, thus secured to each member, he cannot be deprived, by a resolve of the house, or by an act of the legislature.

Id at 27.

[278] *See* Mathew Lyon's case, pp. 1142–44 *supra*, and Duncan Sandys' case, note 178 *supra*, for instances in which statutes of general applicability proscribed legislative functions when applied to representatives.

[279] *E.g.*, bribery statutes. *See* pp. 1157–63 *supra*.

[280] *See* United States v. Brewster, 408 U.S. 501, 521 (1972); Note, *The Bribed Congressman's Immunity From Prosecuiton*, 75 YALE L.J. 335, 349 (1965).

more than counterbalanced by the preservation, intact, of our system of separation of powers.[281]

E. Private Civil Actions

We have thus far examined the scope of the privilege in the context of disputes between the executive and the legislative branch. In these cases the privilege is asserted as a defense against the jurisdiction of the courts and serves its historic function of preserving a separation of powers. Congressmen who violate standards of law and decency in the course of their legislative activity are responsible to their peers in Congress and to the electorate; the theory of the privilege is that the risk of its abuse is far less than the risk created by permitting executive and judicial initiation of essentially political interrogation and discipline.

The literal language of the speech or debate clause does not distinguish between these classic separation of powers cases and disputes in which private citizens invoke the jurisdiction of the courts to enforce their rights against congressmen acting under color of law; and the public generally has come to believe that no such distinction exists.[282] Furthermore, in *Kilbourn v. Thompson*,[283] *Tenney v. Brandhove*,[284] and *Dombrowski v. Eastland*,[285] the Supreme Court held that the privilege immunizes congressmen from suits seeking redress for the violation of individual rights.[286]

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[281] As Pitt stated in his famous protest against Parliament's notorious action in stripping Wilkes of his privileges upon the claim of the Crown that law enforcement was being paralyzed:

> Let the objection, nevertheless, be allowed in its utmost extent, and then compare the inexpediency of not immediately prosecuting on one side, with the inexpediency of stripping the Parliament of all protection from privilege on the other. Unhappy as the option is, the public would rather wish to see the prosecution for crimes suspended, than the Parliament totally unprivileged, although notwithstanding this pretended inconvenience is so warmly magnified on the present occasion, we are not apprised that any such inconvenience has been felt, though the privilege has been enjoyed time immemorial.

342 PROTESTS 68, 73–74 (1763); *see* note 131 *supra*.

[282] This probably explains the insignificant number of slander suits against congressmen for their speeches on the floor. For a lower court decision upholding the privilege in such a case, see Cochran v. Couzens, 42 F.2d 783 (D.C. Cir. 1930), *cert denied*, 282 U.S. 874 (1930). *See also* McGovern v. Martz, 182 F. Supp. 343 (D.D.C. 1960).

[283] 103 U.S. 168, 201–05 (1881).

[284] 341 U.S. 367 (1951). This action was brought against state legislators under the Civil Rights Act of 1871, 42 U.S.C. §§ 1983, 1985 (3) (1970). The Court held that the legislators enjoyed a common law privilege by analogy to the speech or debate clause.

[285] 387 U.S. 82 (1967).

[286] In *Kilbourn*, members of the House of Representatives ordered the unconstitutional arrest of the plaintiff for contempt. *Tenney* involved a state legislative committee that interfered with freedoms of speech and association. In *East-*

These decisions also indicate that the scope of the clause is effectively coextensive in executive-motivated and private-action cases.[287]

Although the early formulation of the speech or debate privilege only covered private civil suits, it developed toward protection against executive-motivated actions.[288] If the historical development of the privilege did not transcend its judicial origins, it is unlikely that the legislative privilege would have been given constitutional stature. The cognate common law doctrine of judicial immunity to private suits did not find a place in article III; nor was the doctrine of executive immunity from such suits included in article II. And there is very little evidence that the Framers anticipated that the speech or debate clause would prohibit private actions.[289] Only the traditional historical view would rigidly encompass this more ancient aspect of the privilege. Since the Supreme Court has not hesitated in the past to go beyond the literal language of constitutional provisions and construe them in light of their history and purposes,[290] this line of private civil cases seems ripe for rethinking.[291]

From a functional perspective, the values at stake in executive-motivated and private actions are very different. The private actions do not usually present the conflict of prerogatives between the executive and legislative branches from which the privilege evolved as a guarantor of legislative independence.[292] Nor do they

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land, a Senate committee chairman ordered the issuance of an unconstitutional subpoena.

[287] *See* United States v. Johnson, 383 U.S. 169, 180–82 (1966). The Court has suggested, however, that there may be legislative acts "of an extraordinary character, for which the members who take part may be held legally responsible." Kilbourn v. Thompson, 103 U.S. 168, 205 (1881). As an example, the Court opined that should congressmen order the execution of the Chief Justice, "we are not prepared to say that such an utter perversion of their powers to a criminal purpose would be screened from punishment by the constitutional provision for freedom of debate." *Id.*

[288] *See* pp. 1122–29 *supra*.

[289] *See* p. 1172 *supra*. *But see* Coffin v. Coffin, 4 Mass. 1 (1808); note 138 *supra*. *Coffin* is the first recorded civil action involving the privilege in either England or America, but was litigated under Article 21 of the Massachusetts Constitution, which by its terms extended the privilege to civil suits.

[290] A familiar example is the clause in art I, § 10 prohibiting the states from passing laws "impairing the obligation of contracts." For a narrow construction of this clause based upon its history and purpose, see Home Bldg. & Loan Ass'n. v. Blaisdell, 290 U.S. 398 (1934).

[291] In fact, despite the holdings in these cases, there are indications that the Court is willing to undertake such a rethinking. *See* pp. 1175–76 *infra*.

[292] Such a conflict could be present if, for example, executive officials who are under investigation by a congressional committee file a civil action in an attempt to thwart the investigation. *Cf.* Frankfurter, *Hands Off the Investigations*, 38 The New Republic 329 (1924). A simple civil-criminal distinction would therefore be imprecise.

generally represent so great an intrusion upon legislative functions. In executive-motivated cases, the mere allegation that a crime has been committed is enough to trigger a grand jury investigation with powers of subpoena and interrogation so broad as to permit massive infringements upon the legislative sphere.[293] If a prosecution is instituted, the congressman faces severe criminal penalties [294] that depend upon how the trier of fact, influenced to an indeterminate degree by the political pressures of the time, subjectively evaluates the propriety of the legislative conduct; and even if the congressman is acquitted the course of a trial may ruin his political career.[295] The potential inhibiting effect of such actions upon the willingness of congressmen to oversee corruption and maladministration by the executive is readily apparent. A broad construction of the privilege in these separation of powers cases is necessary to redress this imbalance of power.

In private civil actions, however, the pattern is usually reversed: a vulnerable individual seeks judicial protection against congressmen who allegedly have used the authority of their office to violate protected rights. It is true that if congressmen are

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[293] *See* Gravel v. United States, 408 U.S. 606, 631–32 (1972) (Stewart, J., dissenting); note 234 *supra*. Theoretically, the grand jury is an independent investigating agency, but its use as a tool of the executive is well known. *See, e.g.*, United States v. Dionisio, 93 S. Ct. 764, 777 (1973) (Douglas, J., dissenting). *Cf. id.* at 773 (majority opinion). In the *Gravel* case, counsel for the Justice Department who was "supervising" the grand jury investigation characterized it as an "executive proceeding." Record at 8, Gravel v. United States, 408 U.S. 606 (1972).

[294] Representative Johnson was first convicted in June of 1963, *see* N.Y. Times, June 14, 1963, at 64, col. 2, and was sentenced to 6 months in prison and fined $5000. N.Y. Times, Oct. 8, 1963, at 22, col. 1; N.Y. Times, Oct. 11, 1963, at 36, col. 1. After his conviction was reversed by the Supreme Court, United States v. Johnson, 383 U.S. 169 (1966), he was retried and convicted, *see* N.Y. Times, Jan. 27, 1968, at 33, col. 3, and was sentenced to 6 months in prison. N.Y. Times, Jan. 31, 1968, at 27, col. 4. His second appeal failed. United States v. Johnson, 419 F.2d 56 (4th Cir. 1969), *cert. denied*, 397 U.S. 1010 (1970).

Following the Supreme Court decision denying his plea of privilege, United States v. Brewster, 408 U.S. 501 (1972), Senator Brewster was convicted of three counts under the bribery statute, 18 U.S.C. § 201(g), which carries a maximum penalty of 2 years imprisonment and $10,000 fine on each count. *See* N.Y. Times, Nov. 17, 1972, at 7, col. 1; N.Y. Times, Nov. 19, 1972, § 4, at 12, col. 1. On February 2, 1973, he was sentenced by Judge Hart to the maximum on each count, the sentences to run consecutively.

Congressman Dowdy was convicted on eight counts of bribery, conflict of interest, and perjury. On February 23, 1972, he was sentenced to a total of 18 months imprisonment and a $25,000 fine. On appeal, the judgment was reversed on the bribery and conflict of interest counts because evidence had been introduced at trial in violation of his speech or debate privilege, but the judgment on the perjury count was affirmed. United States v. Dowdy, No. 72–1614 (4th Cir., March 12, 1973).

[295] *See* United States v. Johnson, 337 F.2d 180, 191 (4th Cir. 1964) (Sobeloff, J.), *aff'd*, 383 U.S. 169 (1966).

obliged to defend these actions on the merits, there is some possibility that they will be inhibited [296] or distracted [297] from the performance of their duties. And the institution of repeated lawsuits can be a successful form of harrassment, even if the actions are meritless. But despite this possibility, the potential adverse effects upon the legislative process and the separation of powers cannot compare to cases in which the executive challenges the right of a congressman to inform the electorate about matters of great public importance.[298]

We do not suggest that courts should be oblivious to the possible effects of private actions upon legislative behavior. But these functional considerations imply that the position of congressmen sued in ordinary civil cases is little different from that of judges or high executive officials. The Supreme Court has concluded that the threat of such actions against judges and executive officials might chill the discharge of the obligations of their office and has therefore maintained a federal common law privilege.[299] For two reasons, such an approach in the case of legislators would be preferable to reading the speech or debate clause as affording a constitutional immunity: (a) judicially-developed common law rules on immunity can be superseded by congressional legislation to protect individual rights; and (b) if experience convinces the Court that abuses of the immunity rules outweigh the benefits which result from them, those rules may be liberalized or even eliminated.[300]

Even assuming, however, that tort suits in general should or will continue to be precluded by the speech or debate clause, functional considerations indicate that the courts should exercise their jurisdiction and consider redress for legislative violations of in-

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[296] *See* Dombrowski v. Eastland, 387 U.S. 82, 85 (1967); Tenney v. Brandhove, 341 U.S. 367, 377 (1951).

[297] *See* Powell v. McCormack, 395 U.S. 486, 505 (1969).

[298] Civil actions certainly embrace the possibility of significant sanctions. Money damages may be extensive, unlike criminal fines; harm to reputation may be great; discovery rules allow extensive investigation; and such litigation may drain a congressman's time and resources for years. But criminal prosecutions raise far more intrusive possibilities: jail terms, fines, extensive publicity, expenditure of time and resources, contempt citation, and irreparable political costs, all preceded by widespread probing at the hands of massive executive investigatory machinery. Moreover, the legitimacy of executive-motivated actions is more suspect than that of civil suits.

[299] *See* Pierson v. Ray, 386 U.S. 547 (1967); Spalding v. Vilas, 161 U.S. 483 (1896). *See also* Barr v. Matteo, 360 U.S. 564 (1959).

[300] Several justices have argued that the related doctrines of judicial and executive immunity should be limited by a malice exception. *See* Pierson v. Ray, 386 U.S. 547, 566–67 (1967) (Douglas, J., dissenting); Barr v. Matteo, 360 U.S. 546, 579–84 (1959) (Warren, C.J., dissenting). *But see* Gregoire v. Biddle, 177 F.2d 579 (2d Cir. 1949).

dividuals' *constitutional* rights. That kind of situation presents two competing constitutional principles — the constitutional rights of individuals pitted against the assertion of legislative privilege.[301] Our system of separation of powers suggests that the balance be drawn on the side of judicial review. The judiciary in our country has always borne the institutional responsibility for protecting individuals against unconstitutional violations of their rights by all branches of the government.[302] Judicial review of unconstitutional legislative action should not be foreclosed whether that action takes the form of a statute or the conduct of an individual congressman. The speech or debate clause cannot be read in isolation from the entire constitutional scheme; judicial respect for and enforcement of the Bill of Rights is no less important than respect for the prerogatives of individual congressmen.

Despite the fact that no civil action has yet been permitted against congressmen for unconstitutional legislative action, the Supreme Court has adopted a compromise which has allowed aggrieved individuals to obtain judicial redress. In *Kilbourn*, *Eastland* and *Powell v. McCormack*,[303] the Court dismissed the actions against the congressmen but allowed the actions to procede against legislative employees who enforced the unconstitutional legislative order.[304] These decisions present no conceptual difficulty. The employees involved were acting as ordinary law enforcement officials in executing an unconstitutional act and infringing protected rights. The presence of these employees as enforcement agents enabled the Court to adjudicate the legality of the congressional act and to vindicate the constitutional rights of the plaintiffs without inhibiting congressmen in their duties.[305]

In some situations, however, this compromise may not afford enough protection, since congressmen possess the power to in-

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[301] This is not the case when the privilege is asserted as a defense to executive-motivated actions. The executive may contend, of course, that the action was instituted because a congressman intruded into its prerogatives. But article II does not purport to give the executive personal rights which it may vindicate by imposing coercive sanctions upon inquisitive congressmen.

[302] But a proper judicial role in executive-motivated suits requires a broad definition of the privilege, *see* pp. 1146–48 *supra*.

[303] 395 U.S. 486 (1969).

[304] In *Kilbourn*, the Court held the Sergeant-at-Arms liable for executing an illegal arrest. Kilbourn v. Thompson, 103 U.S. 168, 202 (1880). In *Eastland*, counsel for the Congressional committee was alleged to have conspired with state officials to conduct an illegal search and seizure; and the Court reversed a lower court judgment dismissing an action against him. Dombrowski v. Eastland, 387 U.S. 82, 84 (1967). In *Powell*, the Court asserted judicial review over the House Clerk and Doorkeeper who had executed an unconstitutional order excluding Congressman Powell. Powell v. McCormack, 395 U.S. 486, 503–05 (1969).

[305] *See* Gravel v. United States, 408 U.S. 606, 617–20 (1972).

fringe rights of free speech, association and privacy without having to call upon the assistance of enforcement agents. *Tenney v. Brandhove* [306] presented just that situation, yet the Court dismissed the action on the basis of a common law legislative privilege.[307] *Tenney* may have been overruled sub silentio in *Bond v. Floyd*,[308] but in *Powell* the Court specifically left open the question [309]

> [w]hether under the Speech or Debate Clause petitioners would be entitled to maintain this action solely against the members of Congress where no agents participated in the challenged action and no other remedy was available.

This question may now be before the Court in *Doe v. McMillan*.[310] The plaintiffs in that case seek declaratory relief and an injunction to prevent the members of a house committee, their assistants and the Public Printer from republishing and distributing a document which allegedly would be an unconstitutional bill of attainder and invasion of privacy. Presumably, the holding in *Gravel* that "republication" is not within the scope of the privilege will dispose of the speech or debate defense. However, if the Court distinguishes *Gravel* [311] it will then be confronted with a

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[306] 341 U.S. 367 (1951).

[307] *See* notes 284, 286 *supra*.

[308] 385 U.S. 116 (1966). Legislator-elect Julian Bond had been excluded from the Georgia House of Representatives because of certain anti-war speeches. As in *Tenney*, a suit was instituted under 42 U.S.C. § 1983 (1970) claiming that this legislative action violated the first amendment. The Supreme Court held for Bond without even a passing reference to *Tenney*. Arguably, the cases are distinguishable because Bond sought injunctive relief only, while Brandhove sought damages. But the doctrine of legislative privilege has always been structured in jurisdictional terms, independent of the kind of relief being sought by the plaintiff. Furthermore, while a grant of damages may perhaps have a greater deterrent effect on individual legislators (who may, however, be reimbursed by their house) an injunction is a much more direct intrusion by the judiciary into the legislative process and is enforceable by the threat of contempt proceedings.

[309] 395 U.S. 486, 506 n.26 (1969). *See also* Gravel v. United States, 408 U.S. 606, 620 (1972).

[310] 459 F.2d 1304 (D.C. Cir. 1972), *cert. granted*, 408 U.S. 922 (1972), *argued* Dec. 13, 1972, 41 U.S.L.W. 3343.

[311] One possible distinction is between activities approved and those disapproved by the house, but this distinction does not appear to be tenable. *See* pp. 1166–68 *supra*. A second possible distinction may have been suggested by certain language in *Brewster*:

> Admittedly, the Speech or Debate Clause must be read broadly to effectuate its purpose of protecting the independence of the Legislative branch, but . . . its purpose [was not] to make Members of Congress super-citizens, immune from criminal responsibility. In its narrowest scope, the Clause is a very large albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers.

United States v. Brewster, 408 U.S. 501, 516 (1972) (footnote omitted). Hope-

direct clash of privilege versus individual constitutional rights. It is theoretically possible that an injunction addressed solely to the legislative employees and the Public Printer would not afford sufficient relief; if the congressmen wish to reproduce and circulate this document, they need only xerox and mail it themselves. Legislative privilege should not foreclose effective judicial review in such an eventuality. It would be a supreme irony if the speech or debate privilege, which was designed to protect against executive intimidation and was placed in a constitution under which courts protect individual rights, were construed so that courts lend their assistance to the executive in breaching the wall of separation of powers but deny relief for the violation of individual rights.

IV. Legislative Remedies

Since the Supreme Court has now held, in effect, that the speech or debate clause does not bar grand jury investigations of and criminal prosecutions against congressmen for deciding how to speak or vote and for informing themselves and the electorate about maladministration and corruption in the executive branch, it remains for Congress to remedy, if possible, the inferior position in which it has been placed. The importance of the Court's decisions goes well beyond the fate of individual Senators such as Gravel and Brewster; the scope of executive and judicial superintendence of the legislative process which is permissible as a result of these decisions jeopardizes the ability of the elected representatives in Congress to carry out independently and meaningfully the powers vested in them by the Constitution.

Congress should begin by considering whether it agrees with the Supreme Court that protection against executive intimidation is not constitutionally required with respect to functions other than those that are "purely legislative," such as "political" activities and " 'errands' for constituents." These include "making . . . appointments with government agencies, assist[ing] in securing government contracts, [and] preparing so-called 'newsletters' to constituents, news releases, and speeches delivered outside the Congress." [312] Should congressmen decide that some or all of

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fully, the Court is not suggesting that the Framers intended to leave congressmen vulnerable to executive intimidation but free to violate the rights of individuals.

If the plaintiffs in *McMillan* are able to overcome the jurisdictional defense of legislative privilege, it is by no means certain that they should obtain the relief they seek on the merits. Even assuming their factual allegations to be true, the plaintiffs nevertheless are asking for a judicially-imposed prior restraint upon publication, and thus upon the first amendment rights of the publishers.

[312] United States v. Brewster, 408 U.S. 501, 512 (1972). *See also* note 196 *supra.*

these "errands" are vital elements of the legislative function in a democratic society and resolve to strengthen the bulwark of separation of powers, there are two possible legislative remedies available, one more effective than the other.

A. House Resolution

Each house has the constitutional power to make rules for its own functioning.[313] Such rules could include a provision forbidding any member, aide, or employee from appearing outside the house to give testimony or produce house or committee documents relating to a wide range of "legislative" and "political" activities.[314] Such a rule could of course be waived by a vote of the house.[315] If such a rule were respected, this would effectively halt grand jury investigations and court hearings into the defined activities by preventing the receipt of important evidence.

However, lacking the formal dignity of a statute, a mere rule of the house would probably be insufficient to remedy the effects of the *Gravel* and *Brewster* opinions.[316] Such a rule would be binding in the sense that any member, aide, or employee who violates it would be subject to the disciplinary powers of the house, including the contempt power.[317] The rule would not, however, be binding upon the court which seeks to enforce a subpoena against a recalcitrant witness, because the order of one house of Congress cannot amend or supersede power vested by statute in a court or grand jury. Furthermore, it has been settled law in both England and America that a single house does not have the power to define its own privileges.[318] It would therefore seem that a house rule would have no more legal effect on the

[313] U.S. Const. art. I, § 5.

[314] Senate Rule XXX, for example, already restricts the giving of outside testimony by Senate employees without the permission of the Senate. Senate Standing Rule XXX, in Senate Manual Containing the Standing Rules, Orders, Laws, and Resolutions Affecting the Business of the United States Senate, S. Doc. No. 92–1, 92d Cong., 1st Sess. 49 (1971). In the *Brewster* case the "privilege of the Senate" and Rule XXX were invoked as the basis for a resolution authorizing David Minton, a staff director and counsel of the Committee on Post Office and Civil Service, to respond to a subpoena issued by the trial court in *Brewster*, but restricting his production of committee documents. S. Res. 373, 92d Cong., 2d Sess., 118 Cong. Rec. 16,766 (daily ed. 1972).

[315] *See* S. Res. 373, 92d Cong., 2d Sess., 118 Cong. Rec. 16,766 (daily ed. 1972).

[316] It should be remembered that any proposed legislative remedy would seek only to ameliorate the *effects* of the Supreme Court's construction of the privilege. Congress cannot change the scope of the speech or debate clause as interpreted by the Supreme Court without a basic judicial rethinking of Marbury v. Madison, 5 U.S. (1 Cranch) 137 (1803).

[317] *Cf.* Groppi v. Leslie, 404 U.S. 496 (1972); Anderson v. Dunn, 19 U.S. (6 Wheat.) 204 (1821).

[318] *See* pp. 1167–70 *supra.*

courts than the amicus brief of the Senate which was filed with the Supreme Court in *Gravel* to express the collective judgment of that body.[319]

Moreover, the passage of a house rule may have practical consequences which are not pleasant to contemplate. A member, aide, or employee subject to such a rule and also subject to a conflicting judicial subpoena would potentially be in the position of facing a contempt citation regardless of what he does: if he obeys the subpoena he will be in contempt of the house, if he obeys the house rule he will be in contempt of the court. This presents the possibility of a direct constitutional confrontation, and one side may back down. Faced with this confrontation the court may decline to enforce the subpoena, holding that the witness was justified in refusing to testify; or the house may waive the rule and allow the subpoena to be enforced. However, both the court and the house may see their essential prerogatives at stake and refuse to compromise, a result which occurred in England during the 1800's with unfortunate results.[320]

B. Congressional Statute

The more practical means for effectuating that degree of privilege which is necessary for Congress to function without unwarranted executive and judicial interference would appear to be the passage of an appropriate statute. Since Congress has the undoubted power to define the scope of the criminal law and to regulate the jurisdiction and procedure of the federal courts, it possesses ample power to protect its members from decisions such as *Brewster* and *Gravel*.

Congress should prohibit grand jury investigations and criminal proceedings which "question in any other place" the legislative activities of a member of Congress and his staff by stripping the grand jury and courts of jurisdiction to entertain such proceedings.[321] For the purpose of this statute, "legislative activities" should be defined as any activity relating to the due functioning of the legislative process and the carrying out of a member's obligations to his house and his constituents. The following should be included specifically: speeches, debates, and votes; conduct in committee; receipt of information for use in legislative proceed-

[319] Amicus Brief of United States Senate, Gravel v. United States, 408 U.S. 606 (1972).

[320] See the discussion of Stockdale v. Hansard, 112 Eng. Rep. 1112 (QB. 1839), *infra* at 1180–81. This confrontation was settled only by passage of the Parliamentary Papers Act, discussed *infra* at 1181.

[321] The same result would occur if Congress were to enact a statute exempting the legislative activities of members of Congress from the criminal prohibitions of the United States Code.

ings; publications and speeches made outside of Congress to inform the public on matters of national or local importance; and the decisionmaking processes behind each of the above.

Enforcement of such a statute would require a delicate procedural mechanism which would ensure not only that the legislatively defined area of privilege is not being infringed, but also that permissible inquiries are not thwarted. Such a mechanism is available via control of the subpoena power. Congress could provide by statute that a member may move to quash any subpoena which he alleges seeks testimony about legislative activity [322] and that such a motion would automatically stay the subpoena. For the subpoena to be enforced, the prosecutor would be required to specify the nature and scope of the proposed inquiry.[323] If it appears to the court that this inquiry infringes upon the forbidden area, the court would quash the subpoena. If the proposed inquiry is permissible under the statutory guidelines, the court would enforce the subpoena with an appropriate protective order against "fishing expeditions" into the Capitol.

This legislative solution is similar to that adopted by the English Parliament to counteract the effects of *Stockdale v. Hansard*,[324] in which successive suits were lodged against the Printer of the House of Commons for "republishing" allegedly defamatory legislative proceedings. When the court held, contrary to prior precedent,[325] that the privilege did not protect publications by the Public Printer, the House of Commons passed a resolution stating that the publications were privileged.[326] Unimpressed, the Queen's Bench held that the resolution was not binding: [327]

> [T]he mere order of the House will not justify an act otherwise illegal, and . . . the simple declaration that that order is made in exercise of a privilege does not prove the privilege . . . .

When Stockdale's lawyer sought to execute the judgment, the House ordered the sheriff not to enforce the court order and as a precautionary measure ordered the Sergeant-at-Arms to arrest the

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[322] In *Gravel*, the Court noted that the privilege is "invocable only by the Senator or by the aide on the Senator's behalf," from which "[i]t follows that an aide's claim of privilege can be repudiated and thus waived by the Senator." Gravel v. United States, 408 U.S. 606, 622 & n.13 (1972).

[323] If a claim of confidentiality were made by the prosecutor, the specification could be made *in camera*.

[324] 112 Eng. Rep. 1112 (Q.B. 1839); 174 Eng. Rep. 196 (Nisi prius 1837).

[325] *See* Rex v. Wright, 101 Eng. Rep. 1396 (1799).

[326] *See* WITTKE, *supra* note 46, at 142–51.

[327] Stockdale v. Hansard, 112 Eng. Rep. 1112, 1169 (Q.B. 1839) (Denman, C.J.).

sheriff.[328] The impasse was deepened by further procedural battles in which the plaintiff unsuccessfully sought an attachment against the sheriff and the sheriff unsuccessfully petitioned the Queen's Bench for a writ of habeas corpus.[329]

The deadlock was finally broken with the passage of a remedial statute. After a monumental debate in which leading members of the House excoriated the *Stockdale* court for placing restraints on the ability of Parliament to inform the people,[330] both houses passed the Parliamentary Papers Act.[331] The Act was prefaced by the claim that "it is essential to the due and effective . . . [functioning] of Parliament . . . that no Obstructions or Impediments should exist to the Publication of . . . Reports, Papers, Votes, or Proceedings" and that there had been too many vexatious lawsuits against printers which threatened to hinder such publication. The Act provided that all subpoenas in criminal or civil proceedings against any person for the publication of papers printed with the approval of the house were to be stayed [332] and that upon production of a certificate of such approval, the proceedings were to be dismissed. Through this procedural mechanism Parliament was able to stop at the outset suits which jeopardized its informing function.[333] By this statute Parliament was able to ensure that the *Stockdale* opinion was an aberrant breach of legislative independence which would never occur again.[334] Congress should ensure the same fate for the *Gravel* and

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[328] *See* WITTKE, *supra* note 46, at 151–54.

[329] *See id.* at 152–55.

[330] *See, e.g.*, 52 PARL. DEB., H. C. (3rd ser.) 330–33 (Lord John Russell), 334–35 (Attorney General Campbell), 361–69 (Sir Robert Peel) (1840).

[331] 3 & 4 Vict., c. 9 (1840).

[332] Our proposal would protect activities generally defined by statute, not activities approved in specific instances by the house.

[333] This concern for terminating proceedings in violation of the privilege at the earliest stage possible is not unlike the concern of American courts that the mere threat of litigation might be sufficient to deter a legislator and that the defense of privilege should therefore be asserted on a motion to dismiss or motion for summary judgment. *See* Powell v. McCormack, 395 U.S. 486, 505–06 & n.25 (1969).

[334] The courts themselves were later to repudiate *Stockdale*. In Wason v. Walter, 4 Q.B. 73 (1868), a newspaper was sued for publishing allegedly defamatory legislative speeches. Since the publication was not pursuant to formal house approval, the Parliamentary Papers Act was inapposite. Nevertheless, the plea of privilege was upheld. While giving "unhesitating and unqualified adhesion" to the "masterly" judgment of the *Stockdale* court that a mere resolution of the house could not confer privilege, the *Wason* court held that the publication "is, independently of such order or assertion of privilege, in itself privileged and lawful." *Id.* at 86–87. On this latter point, the *Wason* court severely criticized the reasoning of *Stockdale*, saying it had expressed "a very shortsighted view of the subject." *Id.* at 91. Stressing the centrality of the informing function to representative government, the *Wason* court forcefully upheld the privilege for publication

Brewster decisions, which represent a much greater threat to legislative independence.

We have discussed proposed legislative remedies only with respect to executive-motivated actions. Congress would be ill-advised to extend any limitation upon court jurisdiction to include civil suits by citizens claiming the deprivation of constitutional rights. Legislative remedies should be designed to protect our system of separate powers; congressmen who would abuse their position and impinge upon rights secured by the Constitution transgress the great principle of separation of powers and give ammunition to those who believe that the concept of legislative privilege has no place in our contemporary society.

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in terms almost identical to Jefferson's protest in *Cabell's* case, *supra* note 150. Wason v. Walter, *supra* at 89.

The above analysis was accepted by the dissenters in Gravel v. United States, 408 U.S. 606, 658–60 & n.1 (1972) (Brennan, J.). But the majority relied heavily upon *Stockdale* and distinguished *Wason* as creating a privilege analogous to the judicial privilege. *Id.* at 622–23 & n.14. It must be remembered, however, that legislative privilege derived historically from judicial privilege, and to the English courts, the two are corolaries insofar as civil suits are concerned. *See* pp. 1122–23 *supra*.

Representative Brooks. Each of you has a statement by Senator Helms setting out his individual views on the subject of these hearings. There being no objection, I will include at this point Senator Helms' statement for the hearing record.

[The statement of Senator Helms follows:]

Individual Views of Senator Jesse Helms (R.-N.C.)

I am deeply disturbed by the present day tendency in many quarters to broaden the scope and make absolute the privilege of immunity from prosecution or proper inquiry. The ultimate effect of this tendency will be to create a certain elite of privileged classes who are above the law and beyond the scope of effective scrutiny and restraint. I apply this observation to all three branches of government, and to the so-called "fourth estate" in which I have spent most of my professional career until I was elected to the Senate.

The natural ambition of most human beings is to stake off a square of territory for his own, and then attempt to defend it against all comers. If we stand inside our little square, then we feel threatened by our challengers. The ordinary impulse is not merely to defend our rights, but to enlarge upon them, and to erect impenetrable barriers around the new boundary.

I think that something of this sort is happening in the current hearings. As a U.S. Senator, I believe strongly in the Speech and Debate Clause, but I do not think that it should be expanded so that it includes nearly every living and breathing action of a Member of Congress. It quite properly says that they should not be questioned in any other place for a Speech or Debate in either House. But this was not intended to give broad immunities. Just previous to the Speech and Debate Clause, the Constitution spells out that they shall be immune from arrest, but with two important exceptions: They cannot be arrested (1) during the session, and (2) except for treason, felony, and breach of the peace.

Historically, the Framers of the Constitution must have been thinking not of the individual, but of George III's manipulations of the legislative bodies of the Colonies and the pressures applied against them so admirably described in the Declaration of Independence. Even so, the Constitution sanctions arrests for treason, felony, and breach of the peace, whether Congress is in session or not. These are crimes of individuals, and crimes ought to be punished. Bribery, for example, is a felony. The acceptance of money to influence a vote is wrong, whether or not the desired vote actually follows in due course. If a Member of Congress is convicted of taking a bribe, then it is irrelevant how he voted afterwards.

It is said that the Senate or the House will appropriately censure wayward members, or that the voters will make the ultimate decision. Speaking realistically, we know that it is not so. The loyalties of party members, the protection of friends, the power of high position all combine to make such punishment a rare event; and when it does occur, more often than not it carries political or ideological overtones. When one man can be made a pariah, then it is easier for the rest of the group to knock him down. The lack of objectivity in such proceedings makes each one fear that he will be the next for a trumped up purge.

As for the people turning the rascal out, we know that such a proceeding is also uncertain. A case of wrong-doing may turn upon subtle distinctions in law or intention; the public may never get the proper facts or perspective; and there is no agency charged with the mission of sorting out the evidence and finding the proper witnesses. The procedure is based upon happenstance. I think that the Speech or Debate Clause should be narrowly interpreted. There are enough elastic clauses in the Constitution as it is.

Speaking as a United States Senator, I believe the same interpretation should also be applied to the other two branches of government. The Judiciary itself is not beyond reproach. It is perfectly proper for Congress to exercise continuing oversight over the Judiciary, and to define and regulate the concept of holding office during "good behavior." Each branch of the government has the right to define the Constitution according to its own lights; and at the same time it is the right, indeed the duty, of the other branches to fight for their own views. The only safeguard of liberty is for a constant state of tension to exist between the three branches, and for each one to be vigorously asserting its rights. If we erect

a rigid wall of separation between the three branches, then the Constitution will lose its dynamic ability to survive. Nor will liberty survive.

Nevertheless, the assertion of rights should be prudent and not over-reaching. The Executive Branch is currently asserting its own privileges over a range which is unacceptable to most Members of Congress. The concept of Executive privilege in its most sweeping form raises only the notion that there is something to hide. I do not necessarily agree with the politically motivated arguments that there actually is something to hide in the present instance. But it is only human nature to assume that some day some Administration *will* have something to hide. Of the various privileges being asserted, the concept of executive privilege is the weakest and has the least Constitutional peg of all. But I would expect, as a matter of consistency, that those arguing for the broadest possible Congressional privilege would also, in fairness, argue for the broadest possible Executive privilege. But in reading the hearings, that does not seem to be the case.

Finally, we come to the fourth estate. There are some journalists who would place their profession on a Constitutionally sacrosanct level. To hear their impassioned argument, one would think that journalism itself was a Constitutionally erected branch of government dedicated to higher standards and finer morals than the representatives actually selected by the people. They speak in terms of a "free press" that "belongs to the people" and that is the last safeguard of the people's liberties.

As a journalist, I believe that the media have a role in informing popular opinion. They can play a constructive role in exposing corruption. But as for "belonging to the people," I might say that I am one person who has yet to get a dividend check from NBC or The Washington Post. The fact is that the media are private enterprises that reflect the interests and aims of their owners and/or practitioners. Their goals are no more high and mighty than those of any other very human institution. They are kept honest only through diversity, competition, and articulate scrutiny by public leaders. I do not think that the media should be immune from public criticism whether in government or ordinary citizens.

Nor do I think that the media should have a privileged position under the law beyond a reasonable interpretation of the First Amendment.

If the press is given an immunity to protect its sources, we must realize that there is no countervailing pressure to prevent abuses of such a privilege. A newsman is a self-appointed advocate, even if he believes himself to be an advocate of the public interest. The public has no choice in choosing him. They do not even pay his salary. His peers have little or no control over him. Moreover, a newsman has the obligation to balance protection of sources against whatever commitments he may be making to people who are violating the law. In the long run, the claims of justice are more important to public order than the claims of sensationalism or "informing the public" under a boldface byline.

Finally, a free press most needs to be a free press—that is free from laws circumscribing and defining its function. Laws asserting immunity by nature must limit and constrict, if they are to be workable. It is better to make no laws at all, than to make laws which allegedly give "protection."

Conflict is the essence of the system of checks and balances. But healthy conflict also assumes self-discipline. Each branch must be bold in asserting its rights, but it must also be bold in striking a balance between claims and common sense.

Representative BROOKS. Since our last day of hearing in late March, the decision has been announced in the case of *Doe* v. *McMillan*—a case involving the publication and distribution of a report of the House District Committee.

Consistent with its interpretation of the Speech or Debate Clause in both the *Gravel* and *Brewster* cases, the court narrowly defined the legislative role of the Congress. In doing so, the court has posed a serious challenge to the Congress and to its independence in discharging its constitutional responsibilities.

The *McMillan* decision serves to underscore the need for this inquiry.

Since the *McMillan* decision is new to our inquiry and since it involves the immunity of legislators to a civil action brought by private individuals, it serves as a good point of departure for our discussion.

It raises questions such as:

What is the legislative role of Congress?

What would the Congress have to do to comply with the Court's view?

How should the Congress respond?

Mr. Valder, as an advocate for petitioners seeking to stop the publication and distribution of a committee report, can we hear from you first?

Mr. Valder. Thank you. The only thing we tried to do was delete the names of our clients from the report. Once we got through 1 day in the district court, having filed the case in the morning and being dismissed in the afternoon, our request from then on was merely to excise the identifying names and addresses from the report. That concession was made very clear to both the court of appeals and the Supreme Court. The focus of our case was more upon the committee staff personnel, the investigators, than it was on Members of the Congress and members of the committee.

It was our view that, had the rules of the House been followed in this case, the case would never have arisen. The rules provide for various ways of protecting privacy and of guarding against possible defamation or degradation of reputation. None of those rules were followed.

I am referring specifically to rule XI, 27(m), which provides that, where any material of this sort is involved, subpoenas, protections, opportunity of private persons to appear, all of those procedures are provided. But, of course, they weren't used at all in this case.

We view this case as an aberration, as a case indicating what can happen when investigators possibly, in our allegation, were more interested in sensation and exposure and worked generally without supervision.

As the record makes clear in our case, the District of Columbia Committee never voted on this report, in fact, never saw it until it was in print. Somehow the processes of that committee worked in such a way that the material was collected, assembled and sent off to the printer through the appropriate machinery of a vote in the House without most of the members of the committee even knowing the report was on its way or what it contained.

So in a practical sense, that is how we view the problem in the *Doe* case. Frankly, it never occurred to us that we would be able to hold Members of Congress for damages—possibly for injunctive relief, but certainly not damages—in this case. Of course the Supreme Court gave us considerably less than we had asked for. Members are immune. I think the case cannot be read any other way. Members have absolute broad immunity for anything dealing with legislative acts.

The case went off on the liability of the Public Printer and the Superintendent of Documents, when they exceeded the statutory publication permitted by, I think the usual publication is 1,682 copies with distribution specified to the Halls of this building and the office buildings that surround this building. When distribution went beyond that, or if it went beyond that, the Supreme Court said that can be enjoined if fundamental rights are being violated.

I view the problem you have as a practical one—essentially following your rules. I think your rules could be tightened. I don't think rule XI, 27(m), is as tight as it could be to protect against this kind of privacy invasion. But at least the idea was there. The spirit was there. If the investigator and the staff consultant had cared about following the rules, the case would have never gone to court. That is my sort of practical judgment on what you might do or what might be done differently.

I was an advocate in this case. I still have that advocate's perspective. But I think there is a substantial danger because of the size of the Congress and its broad investigations that these kinds of privacy invasions might continue or might recur. That bothers me as a lawyer, as a constitutional lawyer and civil rights lawyer.

People did get hurt in this case—we believe hurt badly. It's avoidable.

Those are my general observations. I think you might look at your rules with possible revisions in mind. In this case, this material should have come into the record during the hearing. It did not. There should have been some opportunity for committee members to see it and to grasp its significance. There was no such opportunity. That is just a matter of procedure. It could have been done.

Representative Brooks. Do you feel that the Court should be involved in the preparation of reports or the limitation in any way of reports when, it seems to me, that Congress has the legislative authority and that for the courts to interfere in any way with the preparation of reports which are a vital part of that legislative authority is actually an infringement on congressional legislative authority itself?

If the Supreme Court or the judicial system can restrain or prevent the preparation of reports, regardless of whether they met any test, they could effectively hamstring the entire legislative process.

My question is whether or not they really have any justification for interfering with reports at all, be they good, bad, or otherwise.

Mr. Valder. Yes; this brings us to the separation of powers question, and the Court clearly resolves the issue by saying, yes, we have three coordinate coequal branches of Government, but the courts, the judicial branch will decide, in appropriate cases, if another branch has overstepped the Constitution, and in this case, the Supreme Court said there was a well-pleaded constitutional claim here, and that it would—as it did in the earlier cases, some of these old cases—the Court will sit in judgment upon an allegation that the Congress breached the Constitution, that constitutional rights of individuals are violated. That is, the separation of powers holding in this case, as I read this case, is that the courthouse doors are open.

If private individuals, if they have an allegation well pleaded that their constitutional rights had been violated by Congress, the Court will be open to adjudicate that claim.

The day is over when Members of Congress can ignore the judicial processes.

Now, Members of Congress have to defend——

Chairman Metcalf. I doubt that. As you have outlined the case, there was congressional immunity, even though there was a failure,

as you alleged on the part of the congressional committee of the House, to abide by the rules that were laid down. Nevertheless, the Members of Congress were given immunity. It was just the Superintendent of Documents in the Government Printing Office that was punished for doing what the statute said he had to do.

Mr. VALDER. Let me say one more thing. This case, this impacts you gentlemen more than you might realize. Although in this case the Congressmen are out, what this case means is that in any such case, Congressmen will still have to come into court and explain why they ought to be dismissed.

It used to be they did not even have to go to court, but not so now because some judge will have to decide whether you are in or out, so you have automatically lost some of your immunity.

Chairman METCALF. We sure have. As a result of this strict construction of the Court across the street, we have lost a whole lot of our powers. I think you will admit that, as a civil rights attorney.

Representative GIAIMO. Mr. Valder, as a Member of Congress who has been subjected as of the present to a total of $12 million worth of lawsuits, I do have more than a passing interest in this matter.

I am not as familiar with the *McMillan* case as I am with the others, but do I understand the Court said in effect that we do not have immunity outside of our legislative function in invading, for example, rights of citizens?

Mr. VALDER. That is a good statement of what I think holds.

Representative GIAIMO. OK.

Now, let me put it another way.

This was the subject of libel suits to which I was subjected and several other Members of Congress at present are subjected—one of which I think is still pending in New York—and the courts, as I understand it, theretofore had sustained at least a limited immunity to Congress to inform the public. Is not that right? It was sort of the reverse as we understood the law of the *New York Times* libel case, you know, which says, in effect, which, in effect, says you can libel a public official as long as there is no malice. The reverse of that seems to be that on which we relied in Congress. Not in our legislative activities in the Congress, but that in our broader public duties we can inform the electorate of things which are happening without having to be concerned as much as the private citizen does as to the absolute truth or veracity of the statement. Was not that true?

Professor KURLAND. Why do you say that is separate?

Representative GIAIMO. I will agree with you.

I hope it still is a legislative function; otherwise, I am afraid we are going to be very frightened, and perhaps more careful of speaking out.

We should always be careful of what we say, but if I have to worry after I make a speech, whether x is a malfeasor or x is a crook, or x is stealing Government possessions or money for thus and thus reasons—if I am going to have to worry about being hit with a $10 million lawsuit, it frightens me.

What has your case done to that partial immunity which I think we did have and which the courts were applying—they applied it in several other cases—saying you have absolute immunity under the speech clause on the floor. You have some sort of lesser than absolute immunity, if you are speaking off of the floor.

Would you comment on that?

You put us in the position now where people can say anything they want about us under the *New York Times* doctrine—unless we can show malice, and that is not easy to show—whereas up until your case, we could go out and inform the public of what we thought was happening or what we thought certain individuals were doing without having to base our statement on the absolute truth or veracity.

I am not sure whether we can do that now. I would like to have your thoughts.

Chairman METCALF. I would like to hear from the others on the panel on that also, Congressman. Do you want to respond first, Mr. Valder?

Mr. VALDER. I will make one quick response.

It costs $10 to file a lawsuit. There is no way in the world you are going to keep from being sued.

If somebody wants to sue you, they will sue you.

Representative GIAIMO. I am not worried about that. I understand everybody should have the right to bring a suit.

Mr. VALDER. It costs thousands of dollars to just get a case dismissed and get you out of that case within 6 months. You have already been subjected to a host of harassments, so I assume your question is what about cases that have some prima facie merit, that will get past that easy motion to dismiss.

Representative GIAIMO. That is not my concern.

Chairman METCALF. Let's hear from Professor Bickel.

Professor BICKEL. I think you overestimated the position before, and I do not think *McMillan* changes it much.

It seems to me to follow on *Gravel* and *Brewster* in saying that the absolute immunity, the constitutional immunity that you have does not go beyond a relatively narrowly defined legislative function. That is nothing new in *McMillan*.

Now, I do not think it has been true, Adam Clayton Powell had the contrary experience some years ago, that you have in speaking in New Haven or elsewhere, anything comparable to the kind of protection that newspapers have under the *New York Times* v. *Sullivan* case.

Perhaps you ought to.

Professor KURLAND. Why not start with the predicate of the *New York* case, the immunity in the *New York Times* case?

I do not think that the executive branch officials have it, but the legislative branch——

Professor BICKEL. I could perceive quite a difference. It seems to me that here is the executive branch, there is nothing in the Constitution that gives it any protection at all, and yet they exercise all kinds of discretionary functions, and within some limits of the exercise of those discretionary functions, you ought to have some protection. And then you go over to *Brewster*, and say what about Congress, and what they say about Congress is, well, that the Constitution has a provision, and it is more or less the equivalent of *Barr* and *Matteo*.

We all know it is more than that, it is an absolute protection. What does it reach?

Barr and *Matteo* in the executive branch reaches executive functions.

Here it reaches to the legislative function. If under *Barr* and *Matteo*, some executive secretary, if Secretary Shultz should make a speech,

give a paid lecture at the Yale Law School and libel me by calling me a conservative, let us say, I would think he would be liable under *Barr* and *Matteo.*

By the same token, if somebody should——

Representative GIAIMO. You say that is not a change in the law?

Professor BICKEL. I do think that you perhaps on the merits ought to be entitled to more immunity, more freedom, more elbowroom than you have, and you can legislate it, and I think to conclude the third point, on *Barr* and *Matteo.*

Chairman METCALF. Let us not just throw that phrase away.

You can legislate it. This is the subject of our inquiry.

Professor BICKEL. I do not doubt that. I do not read any of these cases as doing anything more than telling you what it is that the Constitution on its face automatically extends to you by way of protection.

I cannot conceive that you can construe the decision to limit legislation, legislative power on the part of the Congress.

Representative GIAIMO. In my case, two courts have held that we do have immunity in the statements that we make to our constituents off the floor of Congress.

Now, I am concerned whether we have that immunity at all. If we do not, I am going to be very careful and I am going to be intimidated in what I say as a legislator, which to me is a frightening concept.

I am going to be very intimidated not on the floor, but in what I say in New Haven.

I think that is a change. Certainly the two courts I have dealt with indicated I did have a broader immunity than the average citizen because of my duty, as is spelled out in the *McMillan* case. We do not doubt the importance of informing the public about the business of Congress, and they go on from there.

Professor KURLAND. It seems to me, that will put you in a trap. Unintentionally, of course.

He started talking about paid speeches by Mr. Shultz at the Yale Law School. And that essentially is the problem it seems to me that these various cases are framing. What is the legislative function?

Suppose you go back to your constituency in Connecticut, and say that in testimony before our committee, Mr. Bickel said he would be libeled if you called him either a liberal or a conservative. You were informing your constituents of what he said to you in your function as a legislator. That much more easily comes within a legislative function. And it seems to me the real problem of the series of three cases, is that the Court has undertaken to decide what falls within and what falls without the legislative function——

Representative GIAIMO. And they have narrowed it.

I think there was evidence they narrowed it in the *Brewster* decision.

Professor KURLAND. What they have said is that the dissemination of information to the constituency, which is what *McMillan* is all about, falls outside of the protection, at least when performed by an agent. At the same time, they said the agent has the protection——

Professor BICKEL. The example you gave was a quotation from a report to the constituency of legislative materials themselves.

I do not know if they say that would not be protected.

Professor KURLAND. What you had was data that was certainly a proper subject for communication to the Senate.

The publication of this data to the community was the thing that created the issue.

The question of whether that could be subjected——

Professor BICKEL. The arrangement of a private publisher. If *Gravel* had consisted of Gravel getting up, the Senator getting up in Boston and telling a public meeting that at a hearing held before his subcommittee, last week, the following materials were produced, and then reading them off, I do not think the Court is necessarily saying that is not protected.

Professor KURLAND. If Mr. Gravel had gone to Alaska and started to read the Pentagon Papers, you would have gotten the same issue.

Professor BICKEL. But if he had gone to Alaska, and said yesterday we had a hearing in the Senate, and I am about to read you out of the record of that hearing, I do not know that the *Gravel* or *McMillan* case decides that.

Chairman METCALF. Mr. Valder, there were allegations, of course, that Senator Gravel, who is a member of this committee, acted improperly and beyond the rules of the Senate Public Works Committee in reading the so-called Pentagon Papers at a subcommittee meeting. So the controversy was not precisely a result of a regular committee hearing, regularly scheduled and held.

He read the papers and arranged to have them published. Should that have made a difference, do you think? As you say, there was a violation of the rules of the House, in your case.

Mr. VALDER. I think there is a major difference in the *Gravel* and *Brewster* cases and that is the involvement of the executive branch, and another difference is in the terms of the role of the Court, as Professor Kurland just said, that is the new role of the Court.

They are going to decide what is legislative and what is not.

In the context of the *Doe* case, there is a private citizen here claiming a constitutional violation against Members and the staff, and so forth, and to me the advocacy that goes to a court on that case is so much different than the advocacy on enforcement of an executive branch subpoena, that, you know, they are alike in that the courts will make the decision, but they are unlike in all of the circumstances which brings that decision to the Court.

Now, the fact that Senator Gravel read that material in that case, and in our case it was a moonlighting exercise by a District of Columbia policeman where he went around town and got materials from unfaithful schoolteachers and principals and got it into a report. Yes, that is a difference to me, but that is a practical difference.

That just changes the advocacy in court. This investigator, this police sergeant, and Mr. Little, the committee staff consultant gave us so much to advocate. In my judgment it was the coloration of the case that got the Supreme Court to take it up in the first place.

There was a sharp constitutional allegation, and there was no action of the executive branch involved.

Chairman METCALF. What happens if Mr. Giaimo gets up and says that yesterday, at a hearing in the Capitol, Mr. Valder said that so and

so was a moonlighting cop and a lot of the District of Columbia schoolteachers were unfaithful. Is that a violation of the civil rights and the privacy of those people, that moonlighting cop and those unfaithful teachers?

Mr. VALDER. Assuming that the policeman brings suit against Congressman Giaimo?

Chairman METCALF. That is right, or the teachers.

Mr. VALDER. I do not think Congressman Giaimo has anything to worry about, but he will have to hire a lawyer to get that case dismissed, and that will interfere with his legislative function.

Representative GIAIMO. So, therefore, it is better for me not to say anything.

Mr. VALDER. I would say it is better not to interfere with private persons.

Representative GIAIMO. As a Congressman, one who is supposed to be theoretically fearless in the public interest, I have to now begin to worry about what I said. Being mortals, we are all going to begin not to say things that perhaps should be said, because as a practical matter we will have to worry about being sued, about hiring a lawyer, and the Congress does not provide for paying me for the lawyer's services—and they come high in these cases—so the tendency is to say "I am not going to say anything."

Professor KURLAND. That brings us back to the proposition that Mr. Bickel made. You could legislate yourself some immunity.

Representative GIAIMO. We could legislate the lesser Federal courts out of existence too but that isn't the answer. We were covered in the past by court decisions.

Chairman METCALF. I want to hear this.

There is some difference of opinion on the committee as to whether we can broaden and expand the interpretation of the constitutional provisions as laid down by the Court. I would like to have a discussion by these people about our powers to legislate further immunity for Members of Congress.

Professor BICKEL. I am really at a loss to understand what the basis of the doubt is.

Why can't you legislate, legislate a law of libel, you are certainly legislating the rules about the law of libel for the Federal courts.

The only question would be whether the Federal interest is sufficient to enable you to cover the State law.

Professor KURLAND. I agree your proposition is what the law should be. But if I understand the *McMillan* case, is you can legislate a rule of exemption from liability up to the point where you are infringing on a constitutional right of an individual.

Professor BICKEL. The law has to be constitutional.

Professor KURLAND. Privacy now becomes a constitutional proposition, and you cannot legislate yourself immunity from this invasion of privacy.

Professor BICKEL. But they are surely going to have enormous difficulty in saying that privacy, as they define it, the last of the line of the *New York Times* v. *Sullivan* cases, is one thing, but privacy as Congress legislates it for purposes of expression of opinion by Congressmen is another, and that there is a constitutional impediment, inde-

pendent rights of privacy, that prevents Congress from passing a statute immunizing Congress in the same degree in which Metromedia, Inc., is immunized.

Professor KURLAND. The immunity can be extended to the point where the Supreme Court says the immunity is protecting you from the liability for evading a constitutional right. That is the limit.

Professor BICKEL. Metromedia, if that is the limit, then Mr. Giaimo will have very little to fear.

Professor KURLAND. Let me say——

Chairman METCALF. I would like Ms. Lawton to get into this.

Representative GIAIMO. Can I make a request with unanimous consent that all references in the record to Congressman Giaimo be changed to John Doe?

We are going to have a printed record.

Chairman METCALF. Without objection, we will provide that change in the record.

Ms. LAWTON. I think there is legislation dealing with speech, and it may be a great deal easier to justify than when it comes into a conduct area; after all the Speech and Debate Clause literally mentions words, and——

Chairman METCALF. Dealing with speeches in the Senate, or on the House floor, or even in committee?

Ms. LAWTON. I mean even before that, the problem is defining where it relates to the legislative role.

A Congressman who was previously a schoolteacher, who goes out, while a Member of Congress, and makes libelous statements based on his experience as a schoolteacher, having very little if anything, to do with his experience as a legislator, I question whether an immunity statute could be drafted so broadly as to protect him, because he is a Congressman, not because his speech relates to his congressional function, but because he is per se a Congressman, I have some doubts that legislation could be that broad.

Again, even for matters occurring while he is in Congress, suppose he has a hobby of genealogy, and he is making a paid speech based on his hobby, which he continues with while a Congressman, but it is not related to his congressional duties, could legislation by the Congress protect him, not because of any relationship of legislative role. There I have more doubt.

Chairman METCALF. Say we have a man who is a Member of Congress, who was formerly a vice president of a utility company. In this time of an energy crisis, he stands up on the Senate floor, or the House floor, and makes a speech, in which he says that this crisis is the result of the fact we have not had adequate rates for utilities. His defense of the utility program is obviously the result of his previous experience as a representative of a utility company.

Now, I think there is no question but that that speech on the floor would be privileged; is that not right?

Ms. LAWTON. Yes.

Chairman METCALF. Now, suppose he mails that speech out in a newsletter, and broadcasts it to all the people in his State or district. Is that privileged?

Ms. LAWTON. I cannot see where it would be infringing on any other right.

I think at least arguably it is privileged, yes.

Chairman METCALF. Even though there might be a question of ethics?

Ms. LAWTON. There may be a variety of questions. There is so much that depends on the facts that it is almost impossible to say now.

Chairman METCALF. Now, let us take this same man, who can defend his utility or his business or his labor connections in his official capacity without violation of privilege. Let us suppose that he used to be an olympic runner, and has maintained his interest in track as a hobby, as you mentioned. If he makes a speech about his hobby and mails that out, is that privileged?

Ms. LAWTON. He is mailing——

Chairman METCALF. You know, we are considering some legislation about whether we should take the AAU or the NCAA out of the business of running athletics, and so forth. Senator Pastore has a bill in saying we should remove the blackout of the telecast of the Redskins, because they have sold all of the Washington tickets. This business of legislation is a pretty broad thing.

Representative GIAIMO. Let me give you another example.

Right now we have an energy crisis. There are many reasons and suggestions floating around as to why there is a shortage of fuel.

Let us assume that I go home and state to a group in my city, that part of the reason for the energy crisis is that the major oil companies are trying to drive the independents out of business.

Now, I cannot prove and document this, although legislatively I may have some sort of feel either for or against that proposition, but I go out and make that speech. That could be a very damaging speech for which I could conceivably be sued by the major oil companies, could I not?

Ms. LAWTON. Yes, sir.

Representative GIAIMO. Therefore, I'd better not make the speech, except on the floor of the House.

Professor BICKEL. We are now mixing the two issues we are discussing.

One, what is your privilege under the clause as now construed in the last Supreme Court cases, and two, what kind of privilege could you legislate for yourself, and I think the answers are different.

I think in the example you gave, you would not be privileged under these cases.

I think you could certainly legislate the privilege, and the point that strikes me, I gathered an implication from what you were saying that the speech or debate clause would be the source of authority for legislating on this subject, which does not seem to me to be by any means so.

It seems to me Congress has general residual power to legislate.

If it infringes on constitutional rights, that is a stopping point, but I do not think Congress is limited in legislating on this subject by any construction of the speech or debate laws.

I do not think it is limited in legislating on this subject, anymore than it is in legislating on the law of libel as applicable in some other area.

Suppose Congress passed a statute saying that any citizen who comments on any subject that is related to a legislative matter then under consideration by Congress may not be subjected to a libel judgment unless he comments with reckless disregard for the truth, or with malice, that would seem to me to be a constitutional statute in exercise of a necessary and proper power of Congress quite unrelated to the Speech or Debate Clause, and I do not see why that should not apply to Congressmen.

I think the power to legislate here is enormously broad.

There are questions about wisdom, about how much freedom from the law of libel you want to give yourself anymore than anyone else.

We talk about John Doe of Connecticut, but there used to be a Joseph McCarthy of Wisconsin. How much freedom do you want to give him?

There were others that spoke out loud and clear, and I am not sure they should have been all that free of the law of libel, so there is a question of wisdom involved, but I think the legislative power is plenary within the limits that apply to newspapers.

Ms. Lawton. May I ask a question, I do not propose an answer, but assuming the Congress approaches this by legislating a law of libel, in the context perhaps of the jurisdiction of the Federal courts, could we bar all State courts in hearing libel cases, no matter what the subject matter when the libel is committed by a Congressman in office?

Professor Bickel. Obviously in setting the Federal law of libel, the power would be greater, but as it applies to the States, the question would become a question of whether Congress has the Federal power to override State law, and I think as long as it is tied into Federal interests, it may be tied into the full reach of the legislative power of Congress, subject that might be or could be of concern to Congress, which includes the spending or taxing power, and could include almost anything.

Congress I would think would have the power to override State law, in addition under cases I do not particularly favor, under which Congress may legislate to implement the first amendment.

That is a power I do not favor, because I do not like the cases that did that, but it is there constitutionally.

Chairman Metcalf. Now that all the panel members have gotten into our discussion, I would like to have Congressman Cleveland get involved.

Representative Cleveland. I have a slightly different tack I would like to take with the panel, without getting into the merits of the cases we are discussing. One of the things that impressed me particularly after reading these cases, was the dicta or the language in the cases, that very sharply limited legislative activity. It occurred to me that the Supreme Court was operating in something of a vacuum, and they really did not understand the congressional function. Certainly my experience with Congress, and I think that of most other Members, has been that this involves the function of interceding on behalf of constituents with various agencies of the Government that are not doing what they should do, or doing something they ought not to do. It is a very important function. It makes the system of govern-

ment work in some cases. It gives the constituent who cannot afford a lawyer, accountant, or lobbyist, the representation he deserves. It also gives the Member the information, the raw material of the legislative process really, because when we do find things are not working, we do have opportunity to have hearings and legislate in that area. So I get the impression the Supreme Court was going into an area where they could not have had very many facts. I was very disappointed because they dismissed this representative function as serving as errand boy, political type of thing.

This raises the question as to how much information there is about Congress and the legislative function. When Tom Curtis—former Congressman from Missouri—appeared before the panel, he alluded to this. He pointed out that he is on a seven-man committee of the American Bar Association, which hopes to review the teaching of legislative law, perhaps encourage law schools to do more in this area of teaching about legislative law, and hoping that this subject could be better understood. So I would like to have the comments of the panel on two points. One, is whether you feel the law schools today are adequately teaching in this area of legislative law, of practice before Congress. Some people call this lobbying, but it is more than that, because Congress is operating in so many areas, that it is imperative for people to know about this. So the first question is, do you think the law schools are performing properly in this area, with the proper courses, and support? And then the second question is whether you agree or disagree in regards to the Supreme Court's very limiting decision as to what the legislative function is? We can start with Mr. Valder and go right down the line.

Mr. VALDER. Well, I am associated with a law school that has a different approach, the Antioch School is attempting to be a clinical law school from the first year with substantial Federal funds, OEO money with a teaching law firm.

We are limited as poverty lawyers, we cannot lobby on behalf of the clients.

That has posed some problems. There have been instances where full client service would have brought us up here. So to answer your question, at least at my law school, we learn less than we might about the legislative process, because we have got some grant limitations.

Now, speaking generally, I agree with you, I do not think there is enough legislation taught.

My law school was Georgetown, there was one two-credit elective classroom course in legislation.

That was 7 years ago, and I am not sure whether it has been expanded or not.

The programs that have been inaugurated at most law schools are more representational before the courts, and administrative agencies than before legislative bodies.

Representative CLEVELAND. Do you have any opinion on my second point, whether the Supreme Court——

Mr. VALDER. Yes, as far as the *Doe* case is concerned, I do not really think that Congress has been limited in its function.

As the Court's opinion says, Congress persons have a very broad scope of immunity.

I am looking at pages 6 and 7 of your committee print, bottom of page 6, the action of authorizing, and so on, down to communicative processes, and so forth, so when the Supreme Court looked at what was done in the *Doe* case, they found no problem at all with including everything done by the committee, and by its staff, within the scope of the immunity.

The only question they really raised was, did the Public Printer and Superintendent go too far in printing more copies than the statute authorized them to.

They were going beyond their statutory authorization and lost immunity by doing it, so I just do not see the *Doe* case as so important to you folks, as I do maybe to the committee staff people who get a little out of hand.

Chairman METCALF. We all know the reason we print that number is to make copies available to each Member of Congress and for distribution to interested people. For instance, we will send the stenographic report of this hearing over to the Public Printer, and he will abide by the statutes and print as many copies as are necessary.

Now, that does not mean that every Member of the House and every Member of the Senate will get an exact ratio of those copies.

Professor Bickel may say, "Look I was there for that meeting, and I want to have a seminar on this same question. Will you send me copies of the March hearings and the discussion?" So we will send him 10 copies.

Now, that is a distribution beyond the concept announced in the *McMillan* decision.

When I send Professor Bickel 10 copies, and he gives them to some of his students, does that open me—not that I worry about it—but, does that open me to prosecution?

Mr. VALDER. I think that is beginning to raise the question whether that is a legitimate legislative function.

You are getting to that line now.

Representative CLEVELAND. I was speaking more broadly than just to the decision which had to do with committee functioning.

I was disturbed by all of these cases which seem to limit our function to what we are doing here, having hearings, because that is only a small part of what Congressmen do.

The holding of office hours around one's district, and handling the mail-in and mail-out comprise an enormous amount of the workload of the congressional office.

It is in that regard that I am asking if you would form an opinion as to whether you think the Supreme Court decision was knowledgeable, based on your knowledge of Congress.

Mr. VALDER. I would say that if constitutent service were the circumstances under which the next case goes up, the Supreme Court would say this is legitimate legislative functioning.

Now, that is only an opinion, because that case has not been decided, but I just cannot imagine nine lawyers and justices being so naive about what goes on that they would say constituent service is not a legislative function.

Representative BROOKS. I can imagine that, because they have done some very interesting things, and I think Congress ought to consider

the judicial system just about as carefully as they have been considering the legislative system.

I just do not know whether or not it is necessary that people who are lawyers and get appointed to the Federal bench should have lifetime jobs.

It might be that they ought to be reconfirmed, not by the House, but by the U.S. Senate every 6 years.

Professor KURLAND. May I first address myself to Mr. Brooks?

Your proposition was introduced by a constitutional amendment, by Senator Byrd, and I testified on the other side of the question.

Representative BROOKS. What did you say?

Professor KURLAND. I said that I thought this would be destructive—just as I think the problem here is a question of destruction of an independent branch of Government—I think that would be destructive of the independence of the judicial system. If you were concerned, a fixed term by constitutional amendment would be a lot better device. The judges are not subject to approval or disapproval by the Senate for the actions you have taken.

To address Mr. Cleveland's two questions. One, I do not agree with Mr. Curtis. It is quite true there may be a small number of courses labeled legislation in the school curriculums with which I am familiar. But the fact of the matter is that almost any public law course spends a good deal of time in the legislative process, what goes into the making of legislation, on amendments to legislation, on the reasons for legislation, and so forth, I agree there is comparatively little training in legislative advocacy, that is the training of lawyers to present client's positions before a legislative body, althought I think some of that does take place.

Chairman METCALF. We are doing pretty well with ex-Congressmen practicing law in Washington.

Professor KURLAND. It is not limited to legislators, but the executive branch also. They seem to be doing as well.

On the question whether the Supreme Court is unduly limited in its concept of the legislative function, I think it is. I think of two things it has done. One, it has undertaken to make that definition for itself. Yet I think it is a definition that, under the Necessary and Proper Clause, belongs to the Congress rather than to the judiciary.

I think that they—the justices—have taken a narrow view, not of the problem of approaching administrative agencies and old-line agencies, but rather in terms of dissemination of information to the constituency.

Certainly I think that the Congressman from New Haven's constituency is not only the people in New Haven who elected him, but that in the House of Representatives in the U.S. Congress, his constituency is at least in part the entire Nation.

So in filing the brief on behalf of the Senate, we did not go into the problem of the information functions essentially because Mr. Gravel's brief, and the record, his supplementary materials in the record, are quite extensive on the information functions of Congress, including the mail-in and mail-out, and the distribution of the publications of both the House and the Senate. It was not a lack of data

available to the Court, so much as a decision apparently not to utilize that data, or not to accept the data as a demonstration of what the legislative function is.

It was there that I think the Court exceeded its bounds in saying, we will tell you what the legislative function is, although it is quite clear from the congressional behavior over a long period of time now that the Congress has assumed the function is dissemination of information, and not merely through official publications, this is a legislative function, and all legislators, national legislators have engaged in this function for some time.

To that extent, I think the Court was in error. I have to plead the same deficiencies that my fellow panelists have, by saying I was an advocate in the *Gravel* case, and felt strongly about it at that time, and I think I still feel strongly about it.

Representative CLEVELAND. Could I have the other comments?

Ms. LAWTON. As far as law schools are concerned, there has been considerable improvement in recent years with the emphasis on more practical application of the legal training, but I think perhaps State legislatures could do more as could the Congress in cooperating in clinical programs.

The best and more experienced legislative expert in the world cannot teach of course quite as well as perhaps serving a semester, as a law clerk assistant, member of the counsel's office, whatever it is, on the Hill.

Also, there are State legislatures in every State. It may be that they could do more in cooperating with clinical programs or summer internships, or whatever it happens to be, but there is no better place to learn about the Hill than being here, and I assume that is true in State capitals.

In terms of whether the Court understands the legislative role, it seems to me that the Court does understand the role of Congress, but it is saying the Speech and Debate Clause covers less than that, it covers the function of legislating, which is only one function of the Congress of the United States, and I think perhaps it is an interpretation——

Representative CLEVELAND. But you cannot legislate without facts.

Excuse me. I must admit that Congress can and often does, but should not do so without facts. And how do you get facts? You get them from situations.

The thing is that at least this process is one source of facts. If you sit and wait for the lobbyist to bring you the facts, I do not consider that to be satisfactory.

Factfinding should be in dealing with the agencies, with one's constituency, and in reference to a particular case. Often, that particular case comes to you through your mail. Oftentimes when a constituent complains to you, it may be the beginning of a chain of events which puts that legislation in motion. But that is excluded from this immunity, as I understand the Supreme Court decision.

Ms. LAWTON. Yes, but I do not think it is a lack of understanding of how the Congress functions.

It is simply the Court saying, what the Speech and Debate Clause is meant to cover, is the formal process of legislating.

Now, you can argue whether that is right or wrong.

Representative GIAIMO. What do you mean by the formal process of legislating?

Ms. LAWTON. The introduction of the——

Representative GIAIMO. In other words, from what Professor Kurland says, the Court is now beginning to constrict the definition of legislation.

I do not know whether you intended that or not, but that is the way I understood it.

Chairman METCALF. The Court is constricting the definition of what is a legislative act to activities within the very Halls of this building.

Representative GIAIMO. The formal manner of legislating is not so easily defined.

If I want to legislate some energy legislation, it is just not getting up on the floor of the House and making a speech.

The practicalities of the democracy we live in is that you have to generate support, and so forth; therefore, you go out and make speeches and try to generate support for public awareness and support for certain types of energy legislation, and I make the statement I mentioned before. I think that is part of my legislative duty and function, but it is not being made on the floor, and yet——

Ms. LAWTON. I am not disagreeing with that.

Representative GIAIMO. The Court is narrowing that, so you say?

Ms. LAWTON. I think they are reading the words speech and debate not quite that literally, because the Court clearly has read it to include hearings, and votes, which are not, in technical English speech and debate, but they are not saying the other is not a proper role; they are saying these words mean such and such a thing.

That is the distinction I am trying to make. I think they understand the role, but there is this interpretation of those words.

Representative CLEVELAND. Could we have your wrap-up on this?

Professor BICKEL. On the teaching of legislation in the law schools, I think there is less than there ought to be.

When I was in law school in the 1940's, there was a course that Henry Hart gave us at Harvard entitled Legislation, and it was similar to a seminar under that title given by Felix Frankfurter, and it did attempt to teach more about drafting and about the true operation, the realistic operation of the legislative process. But I would be opposed to launching clinical programs.

I think it is a wonderful thing to spend a year on the Hill, but I think a man can do that after he has his law school degree.

I would favor, and a number of us do favor some recruitment of people who do not have only the classic law firm and law clerking experience, but who have legislative experience as staff counsel, or committee counsel, or what have you.

I think a good bit can be done in that direction, and I would favor doing it.

I come to the other half of the question with an open mind. I have not committed myself as an advocate.

Chairman METCALF. That is pretty difficult for a lawyer.

Professor BICKEL. I just do not happen to have been retained in any of these cases.

I first of all read the opinions a little more narrowly than they have been read.

I do not see the Court as having launched itself upon some authoritative definition of the legislative process.

They were deciding two cases. One was a bribery indictment, the other one was a very peculiar set of facts of an attempt to get private publication of a book only part of which was derived from congressional hearings. And they said in those two cases, what I think is their duty, and unavoidably their duty, what the rock-bottom minimal constitutional protection is or can be.

In my judgment, they came out pretty well right, I think, and if more needs to be done by way of protecting Congressman Doe of State *x*, then it seems to me that Congress is in a position to do it. Far from having given to itself the function of defining for Congress the legislative function and the immunities attendant upon it, it seems to me the Court quite properly through the decision threw the ball back to Congress, having told Congress what the Constitution itself does, and I think in the context of those two cases, having said it pretty right.

It does seem to me that so long as you do not go into motives, you ought to be able to punish the taking of a bribe, and it does seem to us wide-ranging private publication of materials should not constitutionally be included in what is immune. If one wants to immunize that kind of activity, I would think that it would have to be done by a statute that is fairly carefully drafted, and has in mind, not only the *Senator Gravel* case, but the late Senator McCarthy, and Congressman Rankin and others who have abused congressional privilege. So I think the ball is in your court.

Representative Cleveland. I think you may be right, and maybe Congress will have to legislate. But it will be a difficult area in which to legislate.

Professor Bickel. Indeed it will, and a more difficult area would have been to make wide-ranging constitutional law.

I am rather glad the Court did not attempt to do that.

Representative Cleveland. Let me get specific before I quit on this question.

It is well known that Members of Congress engage in activities other than the purely legislative activity, which nearly all protected by the Speech and Debate Clause. They include a wide range of legitimate efforts on behalf of constituents.

They are such things as the making of appointments with Government agencies.

Now, getting back to what I said previously, I do not see how you can legislate in a vacuum. Until you have been up against one of these agencies, and have experienced problems with the agencies, you don't have the facts from a representative or legislative standpoint. Take, for example, the Federal Highway Administration, something I happen to know about; their rules and regulations in land damage cases and the taking of land were woefully antiquated.

A road would go through, and a business would be bought, but there would be no compensation for lost business, and no compensation for moving the business, just for the raw value of the land.

Now, as I go to the agency, hammering on the door down there, trying to get decisions on behalf of a constituent, is not that a legitimate legislative activity?

Professor BICKEL. Absolutely, Mr. Cleveland. And I think that passage has a sort of offhand tone to it, which is regrettable, for example, the word "errand" is certainly an ill-chosen word. But I do not think that passage decides anything.

That is a dictum thrown in; it has nothing to do, I forget whether it is *Gravel* or *Brewster* we are reading from, it had nothing to do with——

Chairman METCALF. It is in the *Brewster* opinion.

Professor BICKEL. *Brewster*, with the decision of the case.

Mr. Brewster was indicted for accepting money for what the court fully agreed was legislative action, it was just that, and they held you can convict him of bribery so long as it is not necessarily a part of the allegation of the indictment or the facts to be shown at the trial that you question his motive.

Representative CLEVELAND. Sitting right there, you pointed out exactly why it is going to be so difficult to legislate in this area, because, as you said, this is a case where a Senator took a bribe. That does not sound very good, and then when it comes out we are trying to write legislation to change that case, it will come out in print that what we are trying to do is make bribery legal.

This is difficult both in substance and politically, but the Court does not sit to save us from the more difficult and nasty parts of our tasks.

The fact that it is rather difficult to do it by legislation is not an argument for having had this done by the Court in the name of the Constitution.

Professor BICKEL. Yes. In fact, the argument cuts the other way.

The more difficult it is, the more it needs fine tuning, the less suited is the Court to do it, and the more suited you are to do it.

Chairman METCALF. Professor Kurland.

Professor KURLAND. Mr. Bickel's treatment of the *Gravel* case would make it a very narrow and limited decision.

His treatment seems to me to be totally inconsistent with the last substantive paragraph in the court's opinion—the opinion in effect defines the privilege quite narrowly.

Representative CLEVELAND. What page are you on?

Professor KURLAND. Ninety-three of your committee print—by saying what is the very narrow privilege as the Court has read it.

[The material referred to is the reprint of the texts of the opinions of the Supreme Court Justices in the case of *Gravel* v. *United States* in the Special Report of the Joint Committee on Congressional Operations Identifying *Court Proceedings and Actions of Vital Interest to the Congress*, June 29, 1972, p. 93, which is as follows:]

Focusing first on paragraph two of the order, we think the injunction against interrogating Rodberg with respect to any act, "in the broadest sense," performed by him within the scope of his employment, overly restricts the scope of grand jury inquiry. Rodberg's immunity, testimonial or otherwise, extends only to legislative acts as to which the Senator himself would be immune. The grand jury, therefore, if relevant to its investigation into the possible violations of the criminal law and absent Fifth Amendment objections, may require from Rodberg answers to questions relating to his or the Senator's arrangements, if

any, with respect to republication or with respect to third party conduct under valid investigation by the grand jury, as long as the questions do not implicate legislative action of the Senator. Neither do we perceive any constitutional or other privilege that shields Rodberg, any more than any other witness, from grand jury questions relevant to tracing the source of obviously highly classified documents that came into the Senator's possession and are the basic subject matter of inquiry in this case, as long as no legislative act is implicated by the questions.[17]

Because the Speech or Debate Clause privilege applies both to Senator and aide, it appears to us that paragraph one of the order, alone, would afford ample protection for the privilege if it forbade questioning any witness, including Rodberg: (1) concerning the Senator's conduct, or the conduct of his aides, at the June 29, 1971, meeting of the subcommittee;[18] (2) concerning the motives and purposes behind the Senator's conduct, or that of his aides, at that meeting; (3) concerning communications between the Senator and his aides during the term of their employment and related to said meeting or any other legislative act of the Senator; (4) except as it proves relevant to investigating possible third party crime, concerning any act, in itself not criminal, performed by the Senator, or by his aides in the course of their employment, in preparation for the subcommittee hearing. We leave the final form of such an order to the Court of Appeals in the first instance, or, if that court prefers, to the District Court.

The judgment of the Court of Appeals is vacated and the case is remanded to that court for further proceedings consistent with this opinion.

So ordered.

[17] The Court of Appeals held that the Speech or Debate Clause protects aides as well as Senators and that while third parties may be questioned about the source of a Senator's information, neither aide nor Senator need answer such inquiries. The Government's position is that the aide has no protection under the Speech or Debate Clause and may be questioned even about legislative acts. A contrary ruling, the Government fears, would invite great abuse. On the other hand, Gravel contends that the Court of Appeals insufficiently protected the Senator both with respect to the matter of republicaion and with respect to the scope of inquiry permitted the grand jury in questioning third party witnesses with whom the Senator and his aides dealt. Hence, we are of the view that both the question of the aide's immunity and the question of the extent of that immunity are properly before us in this case. And surely we are not bound by the Government's view of the scope of the privilege.

[18] Having established that neither the Senator nor Rodberg is subject to liability for what occurred at the subcommittee hearing, we perceive no basis for inquiry of either Rodberg or third parties on this subject. If it proves material to establish for the record the fact of publication at the subcommittee hearing, which seems undisputed, the public record of the hearing would appear sufficient for this purpose. We do not intend to imply, however, that in no grand jury investigations or criminal trials of third parties may third-party witnesses be interrogated about legislative acts of Members of Congress. As for inquiry of Rodberg about third party crimes, we are quite sure that the District Court has ample power to keep the grand jury proceedings within proper bounds and to foreclose improvident harassment and fishing expeditions into the affairs of a Member of Congress that are no proper concern of the grand jury or the executive branch.

In this regard, I think you may have been thrown slightly off track by a concern about libel suits which I think is a real concern. But you have to remember that *Gravel*, which you were concerned with, is about the power of the executive branch of the Government to summon a legislator, or legislative aide, before a grand jury for purposes of getting him to reveal data, about his principal's behavior in the legislation.

Professor Bickel. Would you read subparagraph four, which seems to me quite possibly to cover what Mr. Cleveland is worried about.

Professor Kurland. It says it would perform ample protection of the witness, and then four, except, this means they can question.

Professor Bickel. Except as it involves third party crime.

You protect him from being questioned about any act in itself not criminally performed by the Senator or his aides in preparation of the Senate committee hearing.

It seems to me that is ample protection. He can go knocking on the door of the highway agency.

I do not read the case as saying in the appropriate instance in which you want immunity in knocking on the door of the highway agency——

Professor KURLAND. The immunity is limited. That is the problem.

I do see the problem essentially in terms of *Gravel*, that there is the power of the executive branch of the Government to summon aides of Congressmen and Senators for purposes of having them reveal to a grand jury the relationships that they have had with their Congressmen and Senators. And I think that is the basic problem as created by *Gravel*. And it cannot be avoided by—I should not say that—but I think it can be avoided if the Congress undertakes to describe specifically in legislation, as I think Senator Ervin has suggested, the capacity of the grand jury to summon such a person.

Representative CLEVELAND. Professor Bickel, just one more point. You may feel I am unduly alarmed about this situation, but we did have one Member of the House, who, following a series of accidents involving a charter bus in which several of his constituents' children were riding cross country, found out from the Bureau of Motor Carrier Safety downtown that one of two buses on the trip could have been in violation of some safety regulations. In a previous situation, a bus under the same ownership was involved in an accident in which seven children were killed. The Member made public the safety reports and was sued by the bus company. They wanted him to suppress this information. Although the New York courts decided in his favor, again, there was, I think, a $10,000 or $12,000 legal tab facing the Member.

Representative GIAIMO. It was much more than that. He has been up and down, to the appellate division, I think to the Supreme Court of New York, and it will probably be in the Supreme Court of the United States before it is over.

Chairman METCALF. Gentlemen, we can never stop people from instituting a lawsuit.

Representative CLEVELAND. I just want to give one factual situation.

Representative GIAIMO. We cannot stop people from instituting a lawsuit, and Mr. Cleveland just mentioned a particular case that is pending at the present time.

This is the thing that disturbs me. As I stated earlier, I was involved in several similar lawsuits where we made a motion for summary judgment—which is the easy and quick way out of this—and we made allegations saying the affidavit states the matter of law that the statements combined are true. Naturally, we would claim that, although it was never debated because the summary judgment was granted—the utterings of said statements by the defendant, Member of Congress, were absolutely privileged, and we are not saying them on the floor, and the statements were made without actual malice, and the statements of a public figure may not be challenged without constitutionally sufficient evidence of actual malice.

The Court granted a motion for summary judgment by the defendant.

Now, what I am worried about is as a result of the *McMillan* case. Do we still get a summary judgment, or do we have to go in and prove truth or absence of malice, and so forth?

Professor BICKEL. So far as you were granted a motion of summary judgment at least on your third claim, that you were privileged because the defendant was a public figure, you were in under the *New York Times* case.

Representative GIAIMO. Let me get back to Ms. Lawton.

Suppose I go out next week and make a statement that I think part of the reason for the energy crisis is because the major oil companies are out to crush the independents.

You stated earlier that you think that might be libelous.

Ms. LAWTON. I was not commenting it was a libelous statement.

Representative GIAIMO. Then they could bring suit.

Chairman METCALF. The question is whether they could recover, not whether they could bring suit.

Representative GIAIMO. The question I am interested in is, do I have to go through a lengthy lawsuit, or is the Court going to throw it out on a summary judgment, because of the fact I am speaking within my powers as a Congressman?

That is where we feel there has been an infringement or a restriction of our legislative capacities.

Chairman METCALF. Let us get Mr. Valder back into the discussion.

Mr. VALDER. I think it is still a question of law as to whether the acts done were legislative, such that it is appropriate for summary judgment determination.

The *Doe* case did not change that to make it a jury question.

Whether or not it was done within the scope of legislative activity, however defined, will still be a question for the judge to answer as a matter of law.

The *Doe* case will be remanded, and we will see if it is going to be treated as a question of law, if there are any elements that have to go to a jury, but I think for the time being, you can assume it is still a question of law.

Representative GIAIMO. Then we get back to the original concern of this committee which was raised by Professors Kurland and Bickel, that is, are the recent decisions making changes in established law? The *Brewster* case, after all, was much different from the decision that Justice Harlan had handed down in a prior case with which I happen to agree.

I think that was the *Johnson* case. Let us put it right to the Department of Justice. Are we witnessing an attempt by the executive branch to confine the historic privileges which we had, and which, as a result of the *Brewster* case and the *Gravel* case, are now causing us concern that we are not quite as free from intimidation as we have been in the past?

I wish you would comment on that.

Ms. LAWTON. The distinction between *Brewster* or the decision in *Brewster*, and the decision in *Johnson*——

Representative GIAIMO. You prove the bribe without getting into the question of the speech on the floor.

Ms. LAWTON. The Congress itself had said Members of Congress are prosecutable in Federal courts by the Executive for this offense.

That was Congress' own judgment that it was a prosecutable offense.

Representative GIAIMO. That is the statute?

Ms. LAWTON. That is right.

Representative GIAIMO. But in order to prove that prosecutable offense, you had to go into the speech of the Congressman on the floor, which you are prohibited from doing, as I understand it, by the Speech or Debate Clause of the Constitution.

That is the distinction.

Now, it is my privilege to disagree with the majority decision. I am curious as to your opinions of whether or not you think this is the beginning of a constriction of the privilege which we had before, because up until that decision, if you will recall, the decisions of the *Johnson* case and even the lower courts in the *Brewster* case were sustaining our position. So that we do have a very definite change as a result of the majority opinion of the Supreme Court.

Now, is this a change, and is the result there one of a constriction of the immunity clause in the Speech or Debate Clause of the Constitution?

Ms. LAWTON. I think you could make a good argument there was not a change.

There were peculiar parts of the *Brewster* case, and I understand the Government argument to the court which was ignored by the majority, was that there was a waiver by Congress.

Also, it was not necessary to prove the speech. I think that *Brewster* and the *Johnson* cases are not necessarily inconsistent.

There is language in the opinions that seems to be heading in opposite directions, but I do not think the opinions are necessarily inconsistent and I do not think it marks a great constriction.

Chairman METCALF. Would you yield just a moment?

Senator Helms has a little bit different point of view. He is here with us now.

I am going to try to get this room for the remainder of the day. If the panel is agreeable to carry on this dialog this afternoon, can you come back then, Senator?

I would like to have you talk to them.

Senator Helms, in his statement of his individual views filed at the opening of this discussion, felt that the Court is expanding rather than constricting the powers, and I think it would be useful to discuss that.

Professor BICKEL. Mr. Chairman, I am terribly sorry, I cannot be here.

Senator HELMS. If the gentleman would yield, I have a 12 o'clock appointment that I must keep.

Let me say to the distinguished members of the panel, I am the "other" Senator from North Carolina.

I am not a country lawyer, I am not even a lawyer, but I think somebody ought to raise the question, why should I as a U.S. Senator not be held responsible for libelous statements I make off the floor of the Senate, under whatever circumstances?

Second, why should I not be held responsible for any untruthful statement, like any other citizen of this country?

Additionally, is not the Constitution silent as to the "constituent service," so often referred to?

Now, I have been an administrative assistant to two Senators, and I am now a U.S. Senator myself.

I have dealt constantly with Federal agencies, and in each dealing, I have been conscious that there is a right way to do things and a wrong way.

I think as an assistant or as a Senator, I ought to be held responsible for the judgments I make.

Is it possible that it is the course of wisdom, for each Senator and Representative to decide for himself or herself what constitutes legislative process, and to pay the penalty for an error of judgment, and certainly for a violation of integrity?

After all, this is what is required of every other citizen in this country.

One particular thing I like about being on this committee, my colleagues will allow me to sit and disagree as strongly with some of the others as I have done.

In the case of Senator Gravel, who is my neighbor in the Senate Office Building, and to whom I am devoted, he made a judgment in the Pentagon Papers affair.

Many admire him for it, but I think he ought to be willing to stand up to that judgment, to defend it, and to take the consequences if he is wrong.

I think the Constitution does enough when it limits our immunity, when the Constitution limits our immunity to what we say and do on the Senate floor.

Now, I will leave and let you discuss that, and do not throw anything at me as I leave, Mr. Chairman.

Chairman METCALF. If you do not mind, we would like to pursue some comments on the points you have raised.

Can we have some comments from the members of the panel?

Let us start with Professor Kurland. He participated in the *Gravel* case.

Professor KURLAND. Let me talk about several things. On the question whether a Senator or Congressman should be held responsible for his activities as a Senator or Congressman, my answer is I certainly think they should. But the real question is: To whom, to the executive branch, to the judicial branch, or to the legislative branch?

There is a possibility of drawing a distinction between criminal actions brought by the Government and libel actions brought by individuals.

Chairman METCALF. It seems to me we should emphasize that you are responsible to the executive branch in one area and you are responsible to individuals enjoying certain constitutional rights in the other area.

Professor KURLAND. I would point out Mr. Bickel has raised the name of a late Senator from Wisconsin from time to time.

It was ultimately the Senate of the United States which imposed the responsibility on him which lots of people thought should have been imposed, and your fellow Senator from North Carolina played a role in that too.

I do think that one of the possibilities in response to the question is the responsibility ought to be on the House of which a legislator is a member.

Second, when you talk about the liability for truth, that every citizen of the country has, it is certainly true that every citizen has a liability.

It is also true that truth is not a requirement for publication by newspapers, and it seems to me, the same reason for immunity to the press is cause for immunity to Senators and Congressmen when they are making public statements. The limited immunity of making statements that are not malicious.

I do think that a legislator, as every Government official these days, has extraordinary burdens. And this is true of national legislators. One of the things you have to balance, one of the things you have to recognize, is that he is not like every other citizen. He has representative duties as a representative which I think would be interfered with, which might make his performance and function impossible, if he were required to respond without immunity for every remark made outside of the well of the Capitol Building.

That is what I think. And again I would remind Senator Helms that the Senate brief in *Gravel* was different. It was a brief attempting to protect the legislative interests rather than the particular activities that Senator Gravel engaged in during the course of events which gave rise to that litigation.

Chairman METCALF. Your brief is in our hearing record.

I know that Congressman Giaimo wants to get into this discussion. Before I yield, I would like to have comments from the other members of the panel.

Professor Bickel, go ahead.

Professor BICKEL. I might say I am more sympathetic to Senator Helms' point of view than Professor Kurland, but I do think he defines too narrow an area of protection. I think the Court probably construed the Constitution about where it properly ought to have been construed, but we are talking also about what would be wise by way of legislation, and I would think that to narrow the privilege to the point that Senator Helms suggests, would be to constrain and constrict the representative function more than I would think desirable.

I am not sure that I am, in fact I am sure I am not, quite able to approve how far the court has gone to protect newspapers.

I am not at all that enthusiastic about how far the law has gone in this direction.

Perhaps something a little less than reckless disregard of the truth and malice would be well enough to allow a case to go to the jury, and I think I would favor holding Members of Congress to the same standard, but to impose on you a rule of truth, and otherwise responsibility to the extent that you negligently misstate the truth, would seem to me to create an atmosphere of constraint about you, that probably would inhibit your proper legislative function.

One final point, I do not have as much faith in self-regulation by Congress as Mr. Kurland seems to be able to summon.

Yes, they did get Joe McCarthy by and by, but after a long, long time, and then with a mild rap on the knuckles.

Professor KURLAND. Before the courts did though.

Professor BICKEL. But under a state of law, he was careful about going out and subjecting himself to libel suits.

I think the expectation that the Houses of Congress can be relied on effectively to discipline their Members is about similar to the expectation that prosecutors can be expected to effectively regulate themselves, and the police department can be expected to regulate itself.

Certainly in gross cases, one can expect each House to act, but it is a little too close to home, and I see no objection to applying a well-framed statute to Congress, to Members of the Congress through the normal judicial process which is impartial, and which I do not think that Congressmen under a well-framed statute would fear any more than others.

Senator HELMS. I must leave. I do appreciate your letting me have my brief say.

Let me emphasize as I leave the room, that, what I think this country needs is more discipline in truth and not less, and that applies to Senators and Congressman and executive people and judges.

Chairman METCALF. And to CBS.

Senator HELMS. Particularly CBS.

Thank you very much, Mr. Chairman.

Chairman METCALF. Would you mind if we go on with some comments?

Senator HELMS. I would appreciate it, and I will read it with great interest.

I am sorry that I have to leave.

Chairman METCALF. Ms. Lawton.

Ms. LAWTON. I think the liability of members has to be distinguished somewhat as to speech and conduct, between the two, and the courts seem to have done this, or suggested it to some extent.

Matters said in debate are absolutely privileged under the Constitution, and the courts have recognized that.

I do not think the courts have recognized that debate which takes the form of a fist fight as privileged, and I really do not think it should be.

Chairman METCALF. Well, we now have rules against that.

Representative GIAIMO. Along the lines of comment that Professor Bickel made, as a practical matter, part of the problem is that the Congress does not police itself as well as it should, and I agree with that, but I think the question that arises in all of these situations is if a wrong has been committed, as it was alleged and found in the *Brewster* case, who should do the punishing. Should it be the court or should it be the Senate itself, and maybe we have to strengthen our machinery to punish Members.

Second, there is another inhibition upon us as elected officials, and that is the electorate back home that is supposed to keep us in mind so that if we commit wrongs, we are not going to be here; is not that so?

Professor BICKEL. Well, yes, in some measure, but I think Mr. Kurland was right, when he indicated before, that your constituency is really the country, and reliance on the smaller constituency to exert discipline in the national interest is often misplaced.

There are relations that develop between representatives and constituents, the city of Boston with Mayor Curley, there was the case of his election when he was in jail, it was a very amusing episode.

Chairman METCALF. Mr. Langer of North Dakota was elected while in jail.

Professor BICKEL. J. Parnell Thomas of New Jersey was properly punished by the electorate.

Representative GIAIMO. Adam Clayton Powell was reelected after conviction.

Chairman METCALF. Let me interrupt for a moment at this point in the record in order to call attention to an article from the Fordham Law Review on Congressional Self-Discipline. It discusses the history of various cases of exclusion, expulsion, and censure of Members. I wanted to include it at the end of today's hearing, but will refer to it while we are discussing this issue so that anybody reading our record can turn to it.

Professor BICKEL. I cannot see why we should fear the application of the judicial process to Members of Congress that would come under a well-drafted statute.

Representative GIAIMO. When you read the *Brewster* case where the allegation was a bribe, it seems to me there were concerns of Members of Congress as to the difference between a bribe and a legitimate campaign contribution.

Is it what the Department of Justice decides it to be?

Professor BICKEL. That is a legitimate problem.

Representative GIAIMO. How do we cure that?

How do we know?

You do not get campaign contributions from your enemies. You get them from people who agree with your philosophy of legislation.

Professor BICKEL. It is notorious that campaign financing is a messy field that needs attention, and all you are demonstrating to my mind is that much better legislative effort is needed in that area than now exists, and the same thing holds for conflicts of interest, which is another disaster area.

Those are some of the problems. What you are raising is a substantive problem area.

Professor KURLAND. I would like to ask Mr. Bickel a question.

He seems to think that a neutral activity of the judiciary would be adequate with regard to congressional behavior, but I think he does not think that that neutrality is sufficient to suggest they ought to have control over the newspapers.

Professor BICKEL. I thought I said a moment ago, it seems to me the *New York Times* versus *Sullivan* doctrine has been carried too far.

I would have no great concern about a law of libel that stopped well short of where they got, which is Metromedia.

Professor KURLAND. Let me refer to a case with which you do have some familiarity, and that is the second *New York Times* case, to which the question was whether sanctions could be imposed on a newspaper for doing exactly what Senator Gravel is charged with, which is the publication of the Pentagon Papers, which is the question that the grand jury in Boston was investigating Mr. Gravel.

Professor BICKEL. Nobody proposed punishing Senator Gravel for exercising his constitutional function in publishing the Pentagon Papers, namely reading them off that evening.

I would add to that, I agree that injunctive process ought never be available against Congress, and injunctive process was what was attempted to be imposed against the New York Times.

But the *Times* case, I did not argue that the Times was necessarily free of all liability, as it would have been, I believe but the case did not decide it.

Second, the real comparison is between what the Times did in the exercise of its protected constitutional function which is the first amendment function of publishing, and what Senator Gravel did in the exercise of his protected constitutional function, and both were protected.

If the Beacon Press had been subjected to injunctive process, it would have been protected.

All the *Gravel* case involved was the issuing of subpoena to ask him about something that might have resulted in criminal rather than equity action against the Beacon Press, and he resisted the subpoena.

Neither the Times, nor Earl Caldwell, nor Mr. Branzburg, or others who are reporters are under the law entitled to resist subpoenas, although I should disclose, I filed a brief there, and I thought they ought to be in some measure protected.

Professor KURLAND. That is really what I wanted to get in the record.

Professor BICKEL. All right.

Professor KURLAND. In terms of what this committee should recommend as legislation, do you think it would not be appropriate to suggest exactly the same immunity. The immunity the Congress has, that Congressmen and Senators have, should be the same immunity that is now available under the first amendment to the public press.

Professor BICKEL. Yes. I would think so. I regret the length to which the Constitution has been made to go in that area, but it is there, and I would put Congress in the same position as the press, and that is the way I would frame it.

You have other problems, there is the question of a statute dealing with the problem of bribery, with attempting to differentiate between campaign contributions and bribes.

There is ample room for legislation which Congress has never brought itself to address about the distinction between knocking on the door of the highway department on behalf of a constitutent, or in search of information on the one hand, and bringing, as has not been unknown to happen, improper pressure to bear on an administrative agency on the other hand.

That is another thing that Congress could very well legislate on.

It is not an easy problem, but again, that makes it, that is the reason they are legislative rather than judicial problems.

Chairman METCALF. I understand you have an appointment, Professor Bickel. We would like to keep you as long as we can.

Professor BICKEL. Well, it is right in this building.

If I may, I will slip out.

Chairman METCALF. Please stay as long as you can.

We are concerned in this inquiry with yet another question that I think has not been treated.

In the doctrine of separation of powers, of course, the Speech or Debate Clause affords protection to the legislative branch in its relations with the executive and judicial branches.

Therefore, an action instituted by the Justice Department, an executive branch department, raises quite distinct issues, as I understand it, from an action brought by private citizens against a Member of

Congress, for actions he or she has undertaken in an official capacity.

Now, is there not a distinction, and would not that answer some of the questions that Senator Helms raised?

We have to protect Congress from somebody sending a U.S. marshall up, and saying: Look, you called up the highway department, and that was illegal, and that was bribery, and bringing undue influence. We are going to haul you off to jail. That is quite different from the kind of situation described by Mr. Valder, where a congressional publication was alleged to be injurious to his client and a civil suit was filed to stop its distribution.

Is there not a difference?

Ms. LAWTON. There is some debate as to whether the speech and debate clause rests on separation of powers, particularly since it grows out of a system that did not have that, but this is an historical argument. If you pose separation of powers as a basis for drawing broader immunity lines as against the private citizen, you still have not solved the problem of what you do with the State. In our system, the State Governor or the State prosecutor does not appear, so you cannot say it is a violation of separation of powers, as we understand that phrase, for the State to prosecute for bribery. Using separation of powers as a basis will not solve the problem.

Professor BICKEL. For Adam Clayton Powell, I guess it was a civil case. He ended up with a huge money judgment, in the State courts of New York, and in not paying that judgment, he was subject to criminal prosecution to make him pay.

It was not a question of executive as against Congress, but certainly it was pressure brought to bear on him.

Mr. Chairman, if I may, I would like to slip out.

Chairman METCALF. I learned from my colleagues that we cannot have a session this afternoon and I have a vote coming up in the Senate, so we will bring this to a close. Congressman Dellenback, who is very much interested in the subject of this inquiry, was necessarily absent this morning because of the markup of the Land-Use bill in the Interior Committee. He had requested that some questions be raised with the panel, so, if the panel members are agreeable, I will have the staff send supplemental questions to you for your response. I will make such questions and responses a part of the hearing record.

[The supplemental questions and the responses of Ms. Lawton to the questions appear in the Appendix, beginning at page 178, *infra*. Responses were not received from the other members of the panel.]

Professor BICKEL. Certainly, Mr. Chairman. I have appreciated the opportunity to be here.

Chairman METCALF. We have a vote on the minimum wage in the Senate. Would you respond as far as your view of civil rights is concerned? There is a constitutional question raised as to whether or not we can pass a law that would exempt us from immunity that would involve or infringe upon the rights of privacy that you raised in the *McMillan* case.

Mr. VALDER. I think I would like to tie several things together with part of the Constitution that has not been discussed, the bill of attainer clause. We raised the point, but the Supreme Court chose to limit its discussion to speech and debate, but in my view, and this picks up on what Senator Helms said, I make a distinction between Congress as a

unit and the individual Congressmen, I view powers and infringements and rights a little differently, when you look at Congress as a group.

What happened in this case, this was not an individual Congressman, this was Congress exercising some collective power in the *Doe* case, it goes all the way to the point where the full House voted to print a report.

Now, that seemed to us to get to institutional activity, something Ms. Lawton was mentioning.

It was an activity kind of thing. We raised the question and alleged this as a violation of the bill of attainer clause and on this independent ground there is a constitutional remedy apart from a first amendment right of privacy ground, and I would suggest the bill of attainer clause may be a jumping off point for legislative activity.

It is certainly smack in the middle of this area called libel and slander, and that is what this clause was attempting to preclude. The U.S. Constitution prohibits two kinds of bills of attainers, not only as to the Federal legislature, but also as to State legislatures. This clause may be a jumping off point with regard to the question of libel.

There were five or six Supreme Court decisions, and the last one was a long time ago, but as defined, the bill of attainer is a legislative act that inflicts punishment without judicial trial. So that is my first point, and I think you can get some legislative ideas there.

The other point, in response to questions Mr. Giaimo raised, you should be aware that the Department of Justice ducked out of the *Doe* case.

I do not know whether too many people know that, and it is important.

The Department of Justice argued successfully in the lower court in the *Doe* case, that immunity was very, very broad, and then lo and behold, they argue up in New England, in the *Gravel* case, that immunity is very, very narrow, and at that point, we pointed out the inconsistency, and the Solicitor General elected not to go further with the *Doe* case, and private counsel were retained.

I wish Senator Helms were still here, but to me that indicates a separate problem, and that is that you have executive branch involvement in cases of private citizens alleging violation of constitutional rights.

It is what the Justice Department lawyers were defending, which raises still another question about the separation of powers problem.

We had the potential problem of having a separation of powers there simply because of who was defending the defendants.

Chairman METCALF. Did you raise that question?

Mr. VALDER. In our petition for certiorari, we pointed that out, in that it seemed to us there was an argument made in the lower court which succeeded, which may not be a current argument anymore in light of the *Gravel* decision and position taken by the Justice Department in that case.

At that point the solicitor opted out of the case, and the Department of Justice attorneys no longer participated. Former Congressman Bill Cramer from Florida represented the committee along with other attorneys.

Chairman METCALF. I was sued in the District Court of Colorado along with some district judges, and the head of the prison, and so forth. The U.S. district attorney of that district represented all of us.

Now, do you feel that is a violation of the separation of powers?

Mr. VALDER. I think there are some problems there. I cannot tell you all of the implications, but it brings to bear the force of another part of the Government, and while it may not be a conflict between two branches, I think the separation of powers goes the other way, too, that sometimes one branch cannot jump on the other's bandwagon to support them in a suit, especially by private citizens.

Chairman METCALF. I am awfully sorry. I have 5 minutes to make a rollcall on an important amendment on the minimum wage.

This has been a most useful dialog. I think it has been very helpful. I wish we could continue it throughout the afternoon. I thank you all for coming. I am going to have counsel submit some additional questions to you, and your answers will be incorporated and made a part of the record, along with expansion and elaboration of any of the remarks that you have made.

We have received a statement from the American Civil Liberties Union, filed on behalf of Burt Neuborne, the assistant legal director. Without objection, this statement will be included in the hearing record at this point.

[The statement follows:]

STATEMENT OF BURT NEUBORNE, ASSISTANT LEGAL DIRECTOR, AMERICAN CIVIL LIBERTIES UNION

I wish to thank the committee for the opportunity to present the views of the American Civil Liberties Union concerning the scope and effect of the immunity granted to Members of Congress by the speech or debate clause of the Constitution.

Briefly put, we believe that the immunity from judicial review afforded by Article I, Section 6 operates broadly to insulate Members of Congress from the threat of criminal charges leveled by a hostile Executive in an attempt to silence or intimidate a critical or disfavored legislator. Indeed, Article I, Section 6 was designed precisely to prevent the occurrences which culminated in the, in some ways, unfortunate decision of the Supreme Court in *Gravel* v. *United States*, 408 U.S. 606 (1972).

On the other hand, we believe that the speech or debate clause does not insulate members of Congress from judicial review of allegations that their actions impinge upon an individual citizen's fundamental constitutional rights. Thus, for example, we believe that Article I, Section 6 would not preclude judicial review of the constitutionality of subpoenas issued by Congressional committees requiring the production of the membership lists of lawful, albeit controversial, political associations.

I. THE CONSTITUTIONAL TEXT AND ITS HISTORICAL BACKGROUND

Article I, Section 6 of the Constitution provides that Members of Congress:

"* * * shall in all Cases, except Treason, Felony and Breach of the Peace, be privileged from Arrest during their attendance at the Session of their respective Houses, and in going to and returning from the same; *and for any Speech or Debate in either House they shall not be questioned in any other place.*" [Emphasis added.]

The incorporation of the Speech or Debate Clause into our Constitution was designed to protect the Legislative branch from the systematic harassment to which the English Parliament had been subjected in the century preceding the accession of William and Mary to the throne in 1689. In fact, the wording of Article I, Section 6 is directly traceable to a parallel provision contained in the English Bill of Rights of 1689.

During the struggle between the Crown and Parliament which preceded the adoption of the Speech or Debate privilege, the Executive systematically resorted

to politically motivated criminal prosecutions against recalcitrant legislators to crush parliamentary opposition. The prosecutions were, of course, initiated by Executive officials appointed by the Crown and were also heard and determined by judicial officials appointed by—and often highly subservient to—the Crown. The result was a potent *in terrorem* device to stifle legislative dissent. The use of *in terrorem* prosecutions reached its apogee with the initiation of prosecutions charging seditious libel and conspiracy to delay adjournment against three members of the House of Commons. 3 How. St. Tr. 294 (1629). It is generally agreed that the major purpose behind the adoption of the privilege was to disable the Executive from utilizing such *in terrorem* prosecutions. As Mr. Justice Harlan noted:

"There is little doubt that the instigation of criminal charges against critical or disfavored legislators by the executive in a judicial forum was the chief fear prompting the long struggle for parliamentary privilege in England and, in the context of the American system of separation of powers, is the predominate thrust of the Speech or Debate Clause," (*United States v. Johnson*, 393 U.S. 169 (1966)).

It is against this historical background that current questions concerning the scope and meaning of the Speech or Debate Clause must be considered.

II. JUDICIAL INTERPRETATION OF THE SPEECH OR DEBATE CLAUSE

A. Pre-Brewster, Gravel & Doe

The Speech or Debate Clause has been construed by the Supreme Court on eight occasions. *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880); *Tenney* v. *Brandhove*, 341 U.S. 367 (1951); *United States* v. *Johnson*, 383 U.S. 169 (1966); *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967); *Powell* v. *McCormack*, 395 U.S. 486 (1969); *United States* v. *Brewster*, 408 U.S. 501 (1972); *Gravel* v. *United States*, 408 U.S. 606 (1972); *Doe* v. *McMillan*, 411 U.S.L.W. 4752 (May 29, 1973).

In *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880), the Sergeant-at-Arms of the House of Representatives executed a resolution directing the arrest of a named individual. The Supreme Court rejected Thompson's contention that his actions in executing the resolution of Congress were immune from judicial review under Article I, Section 6.

In *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967), the Supreme Court ruled that the Speech or Debate Clause did not bar judicial review of allegations that the counsel to the Senate Internal Security Committee had engaged in an unlawful conspiracy to violate an individual's Fourth Amendment rights by seizing his records for Committee use.

In *Powell* v. *McCormack*, 395 U.S. 486 (1969), the Supreme Court ruled that the Speech or Debate Clause did not preclude judicial review of the enforcement of a Congressional resolution barring Adam Clayton Powell from Congress.

However, in *United States* v. *Johnson*, 383 U.S. 169 (1966), the Supreme Court ruled that the Speech or Debate Clause barred the introduction of evidence concerning the preparation of and motivation for a speech on the floor of Congress in a criminal prosecution for alleged bribery.

Thus, prior to *Brewster*, *Gravel* and *Doe*, the Supreme Court had consistently permitted private persons to seek judicial review of agents of Congress engaged in executing Congressional resolutions, but had refused to permit the Executive to initiate criminal prosecutions against members of Congress arising out of the performance of their Congressional responsibilities. Such a formulation carried out the historical purpose of the Speech or Debate Clause by protecting Congress against a potentially hostile Executive, while protecting individuals against potentially irresponsible Congressmen.

B. Brewster, Gravel and Doe

However, the decisions in *Brewster* and *Gravel* permitted the Executive, for the first time in our nation's history, to instigate criminal charges against members of Congress arising out of the performance of their official duties. And the decision in *Doe* severely limited the rights of individuals to obtain judicial review of legislative actions impinging on their constitutional rights. In addition, the Supreme Court has taken a disturbingly narrow view of the kinds of legislative activities to be covered by the privilege.

In *United States* v. *Brewster*, 408 U.S. 501 (1972), the Supreme Court permitted the Executive branch to initiate criminal proceedings against a Congressman for allegedly accepting bribes to influence his vote on legislation affecting

postal rates so long as evidence of his legislative activities are not utilized. Of course, permitting the Executive to initiate such prosecutions revives precisely the evil which the Speech or Debate Clause sought to dismantle. A hostile Executive may now harass a critical or disfavored legislator by initiating criminal charges against him which in fact arise out of the performance of his duties.

In *Gravel* v. *United States*, 408 U.S. 606 (1972), the Executive attempted to subpoena a Congressional aide to testify before a grand jury investigating allegedly criminal activities involved in the publication of the Pentagon Papers by Senator Gravel.

Mr. Justice White, writing for six members of the Court, rejected the Government's contention that Congressional aides were wholly unprotected by the Speech or Debate clause. He noted that aides had been denied immunity in *Kilbourn*, *Dombrowski* and *Powell*, not because they were aides, but because the acts complained of in those cases would not have qualified for the privilege even if they had been performed by members of Congress.

In explaining the result in *Kilbourn*, Mr. Justice White distinguished between Congressional enactment of the arrest resolution (which was protected by the privilege) and its execution by the Sergeant-at-Arms (which fell outside the scope of the privilege).

In explaining the result in *Dombrowski*, involving an alleged conspiracy to violate the Fourth Amendment, Mr. Justice White stated:

"* * * [u]nlawful conduct of this kind the Speech or Debate Clause simply did not immunize," (33 L.Ed 2d at 599).

Finally, Mr. Justice White explained the Court's decision in *Powell* by characterizing the case as re-asserting:

"* * * judicial power to determine the validity of legislative actions impinging on individual rights * * * and to afford relief against House aides seeking to implement the invalid resolutions," (33 L.Ed 2d at 599).

Mr. Justice White concluded his *Gravel* analysis by stating:

"In Kilbourn-type situations both aide and member should be immune with respect to committee and House action. So too in Eastland as in [Gravel] senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, no prior case has held that members of Congress would be immune if they execute an invalid resolution by themselves carrying out an illegal arrest, or if in order to secure information for a hearing, themselves seize the property or invade the privacy of a citizen. Neither they nor their aides should be immune from liability or questioning in such circumstances." (33 L.Ed 2d at 600).

Applying his analysis to the facts of the *Gravel* case, Mr. Justice White ruled that the actions of Senator Gravel's aide in obtaining the Pentagon Papers and in arranging to have them published by Beacon Press were not immune from scrutiny.

While Mr. Justice White was correct in ruling that individuals could seek judicial review of the acts in question if they were alleged to have violated their constitutional rights, he was incorrect in permitting the Executive to instigate criminal investigations into such acts. While *Kilbourn*, *Dombrowski* and *Powell* support a narrow view of Congressional immunity in the context of civil proceedings commenced by private persons in order to safeguard their constitutional rights, they cannot be utilized as precedent for permitting the Executive to instigate criminal prosecution against legislators. Indeed in the only criminal case prior to *Gravel* and *Brewster*, the Supreme Court categorically denied such power to the Executive. *United States* v. *Johnson*, 383 U.S. 169 (1966).

By uncritically accepting the assumption that identical standards of immunity exist in both civil and criminal proceedings, the majority in *Gravel* ignored the history and purpose of the Speech or Debate Clause and permitted the potential resurgence of precisely the *in terrorem* technique which it was designed to destroy.

The Court again failed to distinguish between the standards of immunity in civil and criminal proceedings in its recent decision in *Doe* v. *McMillan*, 41 U.S.L.W. 4752 (May 29, 1973), this time in a civil action.

In *Doe*, a subcommittee of the House Committee on the District of Columbia issued a report on hearings on the public school system of the District of Columbia which included absentee records, tests, and disciplinary reports on certain named students. Parents of some of the named students brought an action against the Chairman and members of the House Committee on the District of Columbia, some committee staff, the Superintendent of Documents, the Public

Printer, and various officials of the public schools of the District of Columbia, asking injunctive relief and damages.

The Court held that the complaint against the Members of Congress and congressional staff for introducing materials with names at hearings, for referring this material to the Speaker of the House and for voting for publication was barred by the Speech and Debate Clause because those acts were "legislative acts" (citing *Gravel*) and as such, enjoy absolute immunity from suit.

However, the Court held that this absolute immunity did not extend to public distribution of the report, rejecting the claim of the respondents that such public distribution was a necessary part of the legislative function of informing the public. The Court, however, proceeded to limit even this protection for the injured individuals, because they ruled that the material could be distributed internally and be available for inspection by the public and press unless made unavailable by a specific Congressional order.

Because the record did not indicate the extent of publication and distribution that had taken place, the case has been remanded for further action.

The Court in *Doe* again failed to draw any distinction between the scope of the immunity which would exist in civil and in criminal proceedings. This decision thus represents an extension of the holding in *Gravel* that private republication of material presented at a Congressional hearing is not protected by the Speech and Debate clause. This case extends that holding so that some Congressionally-ordered publication by the Superintendent of Documents and the Public Printer is not protected, even though the Congressional act of authorization itself is protected.

Thus, in *Gravel* and *Doe*, the Court has altered the concept of Congressional immunity in two unfortunate ways: 1) it has expanded the liability of Members of Congress to criminal prosecution for publishing information and 2) it has severely limited the rights of individuals to recover for Congressional violations of their constitutional rights in the absence of private publication or outside functionaries who can be sued.

As a result of these decisions, it falls to Congress to enforce the historic thrust of the Speech and Debate Clause by appropriate legislation. Two steps are called for. Firstly, Congress must reassert that publication of information is part of the legislative process. Secondly, Congress must make it clear that individuals must have a right of action for violation of their constitutional rights even though criminal prosecutions are to be barred. There are two possible ways that Congress could achieve the latter. Congress could create different standards of immunity for applying the Speech and Debate Clause in civil and in criminal contexts. Or Congress could make it clear that the Speech and Debate Clause applies to criminal prosecutions but does not bar civil suits by individuals to protect against invasions of their constitutional rights. Such a statute would protect members of the Congress from a hostile Executive, while protecting the public against potential Congressional excesses.

The enactment of such legislation should, of course, be coupled with careful consideration of the rules and procedures by which the Congress itself could initiate and conduct the prosecution of a member alleged to have committed an offense in connection with the performance of his Congressional duties. Perhaps the problem could be dealt with by legislation providing that the initiation and conduct of the prosecution be carried on by Congressional officials, while its ultimate determination remains with the judiciary. Since Congress itself would initiate and conduct the prosecution, the danger of Executive overreaching would be eliminated. Since the judiciary would determine the matter, the dangers of partisanship would be minimized and the rights of the accused afforded due protection.

The existence of a strong and independent Congress is essential to the continued enjoyment of our heritage of freedom. I am, therefore, pleased to have had this opportunity to discuss the steps which Congress may take to protect itself against yet another encroachment upon its constitutional prerogatives.

Chairman METCALF. Thank you all very much for coming.

We will keep the hearing record open until Wednesday, August 1.

The committee now stands adjourned.

[Whereupon, the committee was adjourned at 12:30 p.m.]

[The Fordham Law Review article on congressional self-discipline, referred to by Chairman Metcalf during the course of the discussion at page 100, follows:]

CONGRESSIONAL SELF-DISCIPLINE: THE POWER TO EXPEL, TO EXCLUDE AND TO PUNISH

*GERALD T. McLAUGHLIN**

RECENT events have again focused attention on Congress' power to discipline its members for personal misconduct. On April 19, 1972, the House Committee on Standards of Official Conduct[1] recommended that Texas Representative John Dowdy be stripped of his right to vote on the floor of the House or in committee as a result of his conviction for bribery and perjury.[2] On that same day, two Senators argued before the Supreme Court that the Constitution forbids the executive branch from investigating the official conduct of a member of Congress, and delegates all responsibility for punishing members' wrongdoing to each house of Congress.[3] Finally, on June 29, 1972, a Supreme Court majority in *United States v. Brewster*,[4] while holding that a former Senator was not immune to criminal prosecution for accepting a bribe while in office, commented that Congress did not have specifically articulated standards for the discipline of its members,[5] and that in a disciplinary proceeding a member of Congress "is at the mercy of an almost unbridled discretion of the charging body . . . ."[6]

The Constitution provides Congress with three specific powers to discipline its own members: the power to expel, the power to exclude and the power to punish.[7] Congress needs these powers primarily for two reasons. First, both the Senate and the House of Representatives must maintain their own institutional integrity and the "proper functioning of the legislative process."[8] Second, each house possesses certain privileges which guarantee Congress' existence as a separate but equal branch of government. Not the least of these is the privilege which protects a Senator or

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1. See note 22 infra.

2. Wall St. J., April 20, 1972, at 1, col. 3.

When a member of Congress has been indicted for a felony, the House of Representatives and the Senate usually do not take action until after the conclusion of judicial proceedings. R. Getz, Congressional Ethics 90 (1966) [hereinafter cited as Getz].

3. N.Y. Times, April 20, 1972, at 8, col. 1.

4. 408 U.S. 501 (1972).

5. Id. at 519. See In re Chapman, 166 U.S. 661, 669-70 (1897).

6. 408 U.S. at 519.

7. U.S. Const. art. I, § 5. The power to exclude is inferred from the power of each house to judge the qualifications of its members.

8. Special Committee on Congressional Ethics, Association of the Bar of the City of New York, Congress and the Public Trust 202 (1970) [hereinafter cited as Congress and the Public Trust].

Representative from being questioned elsewhere about his acts or speeches in Congress.[9] If a member of Congress is to enjoy such a broad privilege, Congress requires its own in-house disciplinary sanctions to guard against the abuse of that privilege.[10] In effect then, Congress' power of self-discipline is necessitated both by its internal workings and by its relationship with the other branches of the federal government.

At the same time, however, the power of Congress to expel, to exclude or to punish a member is itself limited by the people's right to elect whomever they wish to represent them.[11] Congress' power to discipline its members and the people's right to choose their representatives have collided in the past[12] and will undoubtedly do so again in the future. This article explores one half of that critical tension: Congress' powers of self-discipline. To that end, the article treats each of Congress' disciplinary powers separately to demonstrate that there are definite procedural and substantive rules which limit the exercise of these powers—rules which do approximate those "specifically articulated standards" whose existence the Supreme Court majority in *Brewster* denied.[13]

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9. U.S. Const. art. I, § 6. The privilege protects members of Congress from inquiry into legislative acts or the motivation behind legislative acts. The privilege does not cover all conduct relating to the legislative process. United States v. Brewster, 408 U.S. 501, 516 (1972). For other recent discussions of the congressional privilege, see Gravel v. United States, 408 U.S. 606 (1972); Gravel, Congressional Privilege: The Case of Sen. Gravel, 167 N.Y.L.J., March 31, 1972, at 1, col. 1.

10. "If Congress did not police itself, its Members would be above all law in the areas protected by Congressional immunity, a concept alien to our legal system and never intended by the framers of the Constitution." Congress and the Public Trust, supra note 8, at 203.

A discussion of when Congress has exclusive jurisdiction to punish a member is beyond the scope of this article. Suffice it to say that in the areas protected by Congressional immunity, Congress alone may punish a member. See United States v. Brewster, 408 U.S. 501, 518 (1972). Outside of this area, however, Congress as well as appropriate federal, state or local authorities may discipline a member. Usually Congress will not seek to punish a member until after the conclusion of any judicial proceedings brought against him. Cf. note 2 supra.

The Supreme Court majority in United States v. Brewster remarked that Congress is ill-equipped to investigate, try and punish its members for conduct that is loosely and incidentally related to the legislative process. 408 U.S. at 518.

11. "A fundamental principle of our representative democracy is, in Hamilton's words, 'that the people should choose whom they please to govern them. . . .' As Madison pointed out at the [Constitutional] Convention, this principle is undermined as much by limiting whom the people can select as by limiting the franchise itself." Powell v. McCormack, 395 U.S. 486, 547 (1969) (citation omitted).

12. Adam Clayton Powell was excluded from the 90th Congress but was overwhelmingly re-elected by his constituents. It was not until the 91st Congress two years later, and only after a long court battle, that Powell was finally seated.

13. See notes 5 & 6 supra and accompanying text.

I. Expulsion

Article I, section 5, clause 2 of the Constitution provides: "Each House may determine the rules of its proceedings, punish its Members for disorderly behavior, and with the concurrence of two thirds, expel a member."

Once a Senator or Representative has been administered the oath of office and takes his seat, he cannot be required to surrender that seat without a two-thirds vote of the particular house (expulsion).[14] On the other hand, if a member has not been seated, a simple majority of the house can prevent him from taking his seat (exclusion).[15] The seating of a member thus becomes critical because thereafter the member cannot be removed except by expulsion, requiring the concurrence of two-thirds of his colleagues. It is true that certain rights of a seated member may be temporarily suspended by a majority vote as a punishment, but suspension does not deprive a member of his seat.[16] If a house votes to expel or exclude a member, however, the seat thereby becomes vacant and a special election must be held.[17]

Except for the requirement of a two-thirds majority, the Constitution does not explicitly restrict Congress' power to expel. This does not mean, however, that the power of expulsion is untrammelled. Certain limitations, both procedural and substantive, restrict Congress' exercise of this sanction.

A. *Procedural Restraints*

1. Participation in Expulsion Proceedings

In *Powell v. McCormack*,[18] the Supreme Court remarked that a member may as a matter of right address his colleagues and participate fully in the debate on his expulsion, while a member-elect whose exclusion is under consideration apparently does not have the same right.[19] Although a mem-

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14. Powell v. McCormack, 395 U.S. 486, 507 n.27 (1969). There may be one exception to this rule, however. See text accompanying notes 60-61 infra.

15. 395 U.S. 486, 507 n.27.

16. For a discussion of suspension, see Hobbs, Comments on Powell v. McCormack, 17 U.C.L.A.L. Rev. 129, 151-52 (1969) [hereinafter cited as Hobbs].

17. U.S. Const. art. I, § 2, cl. 4 provides: "When vacancies happen in the representation from any State, the Executive authority thereof shall issue writs of election to fill such vacancies." U.S. Const. amend. XVII, cl. 2 provides that in the case of the Senate the legislature of any state may empower the executive thereof to make temporary appointments until the people fill the vacancies by election as the legislature may direct.

18. 395 U.S. 486 (1969).

19. Id. at 510 n.30 (1969). This comment may have greater significance than at first appears. As one commentator remarked: "This also might be interpreted as an indication of

ber-elect may be permitted to speak in his own behalf,[20] a seated Senator or Representative, as an already functioning member of Congress, would seem to have the stronger claim to participate in the debate over his expulsion.

Although not specifically required by rule or court decision, reasonable procedural rights should be extended to a member whose expulsion is being considered: the right to attend with counsel any relevant committee hearings, the right to have witnesses subpoenaed in his defense, the right to have a written statement of the accusations made against him, the right to a transcript of all hearings where testimony is taken and the right to cross-examine his accusers.[21] Since the appropriate committee of the House or Senate will usually investigate the allegations made against the member and recommend a course of action to the full body, it is imperative that these procedural rights be afforded in the committee hearings.[22] To permit the exercise of certain of these rights during a full Senate or House debate on a member's expulsion may be unwieldy.[23] In any event

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a willingness on the part of the Court to pass constitutional judgment on the appropriateness of House procedures. There is, however, a more important implication, namely, that the Court possesses the competence to determine exactly what those procedures are." Hobbs, supra note 16, at 144.

For a discussion of the problems of jurisdiction and justiciability raised by these remarks, see Weckstein, Comments on Powell v. McCormack, 17 U.C.L.A.L. Rev. 73, 77-89 (1969).

20. 1 A. Hinds, Precedents of the House of Representatives of the United States § 474 (1907) [hereinafter cited as Hinds].

21. In the expulsion proceedings brought against him, Senator John Smith of Ohio requested that he be informed specifically of the charges against him, that he be allowed to make a defense against such charges, and have process to compel the attendance of witnesses and the privilege of being heard by counsel. The Senate permitted him to be heard by counsel; the other requests were not granted, however. 2 Hinds, supra note 20, § 1264.

In United States v. Brewster, the Supreme Court expressed the view that the process of disciplining a member in Congress is not without some risk of abuse since "it is not surrounded with the panoply of protective shields that are present in a criminal case." 408 U.S. at 519.

22. In 1964, the Senate established the Select Committee on Standards and Conduct to investigate allegations of improper conduct on the part of Senators. Before recommending any disciplinary action to the full Senate, the Committee must give the individuals concerned due notice and an opportunity for a hearing. S. Res. 338, 88th Cong., 2d Sess. § 2(a)(2) 110 Cong. Rec. 16,939 (1964). Beyond this, there is no requirement that the Committee grant a member being investigated any procedural rights.

In 1968 the House of Representatives established a Committee on Standards of Official Conduct to investigate alleged wrongdoings of its members. Again, the only procedural requirement is for notice and a hearing. H.R. Doc. No. 402, 90th Cong., 2d Sess. § 720, Rule XI (19)(c)(2) (1968).

23. Counsel for Senator John Smith argued before the entire Senate during the debates

Congress should remember that when it expels a member, it effectively acts as a court[24] and should be limited by reasonable due process requirements.[25]

2. Two-Thirds Majority

The most important limitation on Congress' use of the expulsion power is the requirement that two-thirds of the membership of the particular house concur.[26] Although Gouverneur Morris felt that a simple majority should have the power to expel,[27] James Madison urged the view that "expulsion was too important to be exercised by a bare majority of a quorum; and in emergencies . . . [one] faction might be dangerously abused."[28] This is one of several areas in the Constitution where a two-thirds majority is required. By a two-thirds vote of both houses, Congress may remove an incapacitated President,[29] override a Presidential veto[30] or propose a Constitutional amendment.[31] Similarly, a two-thirds vote of the Senate is necessary to impeach a member of the executive or the federal judiciary.[32] All of these areas are of particular importance since they are integral to the scheme of checks and balances under which the three branches of government operate. Expulsion is no less important, not because it involves intragovernmental checks and balances, but because it involves the people's basic right to be represented in Congress by the member of their choice.

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over his expulsion (1807). See 2 Hinds, supra note 20, § 1264. A member has been permitted to cross-examine other members during the expulsion debate. Id. § 1643.

24. United States v. Brewster, 408 U.S. 501, 518 (1972).

25. Differing views have been expressed as to whether Congress could expel a member based on evidence that would be inadmissible in court. See the committee report in the expulsion case of John Smith of Ohio (1807) cited in 2 Hinds, supra note 20, § 1264, for the position that ordinarily inadmissible evidence may be considered. For a different position see the remarks of Senator Bayard of Delaware, Id. § 1269.

26. U.S. Const. art. I, § 5, cl. 2.

By analogy to certain Supreme Court decisions, it could be argued that the majority required to expel a member is two-thirds of those present in each house (assuming the presence of a quorum) and not of the entire membership. See National Prohibition Cases, 253 U.S. 350, 386 (1920) (a vote of two-thirds of those members present in each house is sufficient for the adoption of a constitutional amendment); Missouri Pac. Ry. v. Kansas, 248 U.S. 276 (1919) (a Presidential veto might be overridden by a vote of two-thirds of the members present).

27. Records of the Federal Convention of 1784, at 254 (M. Farrand ed. 1937).

28. C. Warren, The Making of the Constitution 424 (1928). See United States v. Brewster, 408 U.S. 501 (1972) ("[I]t would be somewhat naive to assume that the triers would be wholly objective and free from considerations of party and politics and the passions of the moment"). Id. at 519-20.

29. U.S. Const. amend. XXV, § 4.

30. Id. art. I, § 7, cl. 2.

31. Id. art. V.

32. Id. art. I, § 3, cl. 6.

B. *Substantive Restraints*

In addition to these procedural limitations, are there substantive restraints which limit the expulsion power, or may Congress expel a member for any reason whatever? There are convincing arguments that Congress' power to expel is not unlimited.

1. Prior Misconduct

Both houses of Congress seem to distrust their power to expel a member for misconduct committed either during prior Congresses or before entering Congress.[33] This distrust has been justified in several ways. To those who view expulsion as a power given "to enable each house to exercise its constitutional function of legislation unobstructed,"[34] the remedy is not warranted as long as the member's conduct does not obstruct *this* Congress in its legislative work. To those who claim that the people are the final judge of the conduct of those who represent them, "prior misconduct is pardoned . . . by the electorate."[35] For whatever reasons, Congress will probably not expel a member for prior misconduct, except perhaps in extreme cases.[36]

2. Grounds for Expulsion

The Senate by a two-thirds vote may impeach a member of the executive or a federal judge. The Constitution provides for impeachment for officials of the executive and federal judiciary, but curiously, not for members of Congress. Expulsion, which also requires a two-thirds vote, was doubtlessly intended to be the equivalent punishment for members of Congress.[37] This

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33. Powell v. McCormack, 395 U.S. 486, 508-09 (1969). For cases in the House of Representatives and Senate concerning prior misconduct, see 2 Hinds, supra note 20, §§ 1283-89.

It is not clear to what extent Congress could discipline a former member for misconduct occurring while he was a member. See United States v. Brewster, 408 U.S. 501 (1972). Undoubtedly much would depend on whether the acts of the former member were within the scope of congressional immunity. See note 9 supra.

34. H.R. Rep. No. 815, 44th Cong., 1st Sess. 2 (1876), cited in Powell v. McCormack, 395 U.S. 486, 509 n.29 (1969).

35. Hobbs, supra note 16, at 146.

36. Although it ultimately cleared him of all charges, a Senate committee did investigate alleged prior misconduct by Senator Charles H. Dietrich of Nebraska (1904). It should be noted, however, that Dietrich himself had requested the investigation. Senate Election, Expulsion and Censure Cases from 1789-1960, Sen. Doc. No. 71, 87th Cong., 2d Sess. 98 (1962) [hereinafter cited as Senate Cases].

For a view that the power to expel for prior misconduct is desirable, see Note, The Power of a House of Congress to Judge the Qualifications of Its Members, 81 Harv. L. Rev. 673, 684 (1968).

37. See Congress and the Public Trust, supra note 8, at 204. An impeachment proceed-

close identity between impeachment and expulsion should not be forgotten when analyzing substantive restraints on Congress' power to expel.

While the Constitution is silent as to the offenses which would cause a member to be expelled, it does mention offenses for which impeachment is appropriate. Article II, section 4 provides that "[t]he President, Vice President and all civil officers of the United States, shall be removed from office on impeachment for, and conviction of, treason, bribery, or other high crimes and misdemeanors." There can be little argument that treason and bribery are proper grounds for impeachment since they are both indictable offenses and involve a breach of the public trust. The meaning of the phrase "other high crimes and misdemeanors," however, is less clear. The use of the word "other" seems to imply that any additional grounds for impeachment should be of the same serious nature as treason and bribery and involve official misconduct. From the constitutional debates, it is evident that the impeachment provisions were aimed at preventing "the possibility of tyrannical, oppressive, corrupt and willful use of the power connected with a public office."[38] Thus, to be impeachable, the conduct in question must either be an indictable offense which involves serious consequences to the United States or, if not an indictable offense, one which involves malicious or corrupt acts in the discharge of official duties, causing great detriment to the United States.[39]

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ing has been brought against only one member of Congress. On July 7, 1797 the House decided to bring impeachment proceedings against William Blount of Tennessee. The charges included a conspiracy to transfer to England property belonging to Spain in Florida and Louisiana, thereby violating America's neutrality, and attempts to foment trouble between certain Indian tribes and the United States. Blount was first expelled from the Senate; then he attacked the jurisdiction of the Senate to try him for impeachment. His claim that he could not be considered a "civil officer" of the United States subject to impeachment was ultimately upheld by the Senate when it dismissed the impeachment proceedings. This result has been considered a precedent for the proposition that members of Congress are not impeachable. See Feerick, Impeaching Federal Judges: A Study of the Constitutional Provisions, 39 Fordham L. Rev. 1, 25-26 (1970) [hereinafter cited as Feerick]; Senate Cases, supra note 36, at 3.

On January 28, 1873, the Vice President asked the Senate to form a committee to investigate charges made against his character. The request was opposed because the Vice President was not a member of the Senate who might be expelled, but an officer of Government, who should be proceeded against by impeachment. The Vice President's request to appoint the committee was denied. 2 Hinds, supra note 20, § 1242. In this instance the power to expel was considered the equivalent of impeachment.

See also id. § 1286, citing a House investigation report: "The office of the power of expulsion is so much the same as that of the power to impeach that we think it may be safely assumed that whatever would be a good cause of impeachment would also be a good cause of expulsion."

38. Feerick, supra note 37, at 53.

39. Id. at 54-55 & n.286. Even though Congress may expel a member who commits an

It has been argued, however, that "an impeachable offense is whatever the majority of the House of Representatives considers [it] to be at a given moment in history; conviction results from whatever offense or offenses two-thirds of the [Senate] considers to be sufficiently serious to require removal of the accused from office."[40] Such arguments clearly go too far. The Constitution does set limits on what acts may be considered impeachable. An official's private and lawful conduct, outside the scope of his office, cannot be the basis of impeachment since it is not indictable and it does not involve a betrayal of the public trust. Thus, for example, if a federal official has permitted excerpts from his book to be printed near nude photographs and a caricature of the President, he has not committed an impeachable offense.[41]

If an official of the executive or a federal judge may be impeached only for misconduct in office, Senators and Representatives should be expelled only for similar conduct. As with impeachment, intimations that each house of Congress has unlimited power to expel a member for any conduct whatsoever are wrong.[42] Congress should exercise its expulsion power only when a serious indictable offense has been perpetrated or when the particular member of Congress has betrayed the public trust by misconduct in office.

Even without reference to the impeachment provision, however, other constitutional limitations would restrict Congress' exercise of its expulsion power.[43] The right to freedom of speech clearly restricts Congress' power to expel a member for remarks made either in or outside Congress.[44] In

indictable offense involving serious consequences to the United States, there must still be the two-thirds vote to expel. Otherwise Congress, by a simple majority vote, could pass a criminal statute, conviction under which would result in immediate forfeiture of a member's seat. For a discussion of such problems, see Getz, supra note 2, at 91-92.

40. 116 Cong. Rec. 11913 (1970) (Remarks of Congressman Ford).

41. These were some of the numerous charges levelled against Justice William O. Douglas. See id. at 11916 (Remarks of Congressman Ford).

42. See In re Chapman, 166 U.S. 661, 669-70 (1897); Congress and the Public Trust, supra note 8, at 203-204; 2 Hinds, supra note 20, § 1279 (committee report cited therein at 843). Congress has more latitude in punishing a member than in expelling him. See notes 117-20 infra and accompanying text.

43. See Weckstein, Comments on Powell v. McCormack, 17 U.C.L.A.L. Rev. 73, 90 (1969); Note, The Power of a House of Congress to Judge the Qualifications of Its Members, 81 Harv. L. Rev. 673, 674-75 (1968).

In discussing the Senate's power to judge the qualifications of its members, the Supreme Court observed that the exercise of this power was "subject only to the restraints imposed by or found in the implications of the Constitution." Barry v. United States ex rel. Cunningham, 279 U.S. 597, 614 (1929).

44. Of course, there are limitations even on a legislator's freedom of speech. If his remarks are treasonable, Congress could rightly expel the member. The "speech and debate" clause immunizes a member from being questioned "in any other place" but not in the House or

Bond v. Floyd,[45] the Supreme Court observed: "The interest of the public in hearing all sides of a public issue is hardly advanced by extending more protection to citizen-critics than to legislators."[46] Similarly, a member could not be constitutionally expelled for his religious beliefs unless these beliefs were somehow detrimental to the country.[47] Both the due process clause and the equal protection clause would also be relevant in this context. The due process clause would prohibit a house of Congress from expelling a member on grounds that bear "no rational relation to legitimate concerns of the legislature."[48] The equal protection clause would prevent Congress from arbitrarily expelling certain members on grounds of wealth, age, race or profession. Finally, Congress would be prohibited from employing bills of attainder or ex post facto laws in order to expel a member.[49]

C. *Expulsion Cases in the Senate and House of Representatives*

From an analysis of the Senate and House cases, several conclusions can be drawn. First, expulsion is rarely used by either house. No member of either the House or the Senate has been expelled since 1862 and there have been few attempted expulsions in recent decades. Second, whenever the House or the Senate has expelled a member, it has been for treason or dis-

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Senate itself. In 1917 the Minnesota Commission of Public Safety presented a resolution to the Senate "looking to the expulsion of Senator Robert M. La Follette 'as a teacher of disloyalty and sedition, giving aid and comfort to our enemies, and hindering the Government in the conduct of the war,' such petition being based upon a speech of alleged disloyal nature . . . ." The committee investigating this and other charges against Senator La Follette decided that the speech did not merit action by the Senate. Senate Cases, supra note 36, at 110.

Similarly, expulsion resolutions were introduced against two members of the House of Representatives for words alleged to be treasonable (1864). 2 Hinds, supra note 20, §§ 1253-54.

45. 385 U.S. 116 (1966).

46. Id. at 136.

47. In the unsuccessful attempt to expel him (1907), Senator Reed Smoot of Utah was accused of "membership in a religious hierarchy that countenanced and encouraged polygamy and a united church and state contrary to the spirit of the Constitution. . . ." Senate Cases, supra note 36, at 98. Clearly Congress did not consider these beliefs to be so harmful to the United States as to merit expulsion. See also U.S. Const. art. VI, cl. 3, which prohibits any religious test from being required as a qualification to any public office under the United States.

48. Note, The Power of a House of Congress to Judge the Qualifications of Its Members, 81 Harv. L. Rev. 673, 674 (1968). In another context, the Supreme Court has remarked: "The Constitution empowers each house to determine its rules of proceedings. It may not by its rules ignore constitutional restraints or violate fundamental rights . . . ." United States v. Ballin, 144 U.S. 1, 5 (1892).

49. U.S. Const. art. I, § 9, cl. 3.

loyalty. Even when Congressional committees have proposed a member's expulsion, the offenses alleged have usually involved serious official misconduct. Thus, it seems that in practice the Senate and House have equated the grounds of expulsion with the grounds of impeachment.

1. Senate

In all, twenty-three Senators have been expelled.[50] Twenty-two of the twenty-three cases occurred during the Civil War; the only other instance, that of William Blount of Tennessee, occurred in 1797. It is interesting to note that the basis of expulsion in each case was treason or disloyalty. Blount, for example, was expelled for plotting with the British to seize Spanish Florida and Louisiana and for instigating trouble with the Indians.[51] On February 15, 1862, Jesse D. Bright of Indiana was expelled because he had written a letter to Jefferson Davis introducing a friend who wished "to dispose of what he regards a great improvement in firearms."[52]

Ten other Senators, although not expelled, have been the subject of Senatorial expulsion proceedings.[53] In four of these cases the basis for the attempted expulsion was suspected treason or disloyalty.[54] Accepting bribes or receiving compensation for services rendered before a department of the Government was the charge in five other cases.[55] In the final case, Senator Reed Smoot of Utah was charged with membership in a "religious hier-

50. They are: William Blount of Tennessee (1797), Senate Cases, supra note 36, at 3; Jefferson Davis, Albert G. Brown, Stephen R. Mallory, David L. Yulee, Clement C. Clay, Benjamin Fitzpatrick, Robert Toombs and Judah P. Benjamin (1861), id. at 27; James M. Mason, Robert M. T. Hunter, Thomas L. Clingman, Thomas Bragg, James Chestnut, Jr., A. O. P. Nicholson, William K. Sebastian, Charles C. Mitchel, John Hemphill and Louis T. Wigfall (1861), id. at 28; John C. Breckenridge (1861), id. at 29; Jesse D. Bright (1862), id. at 30; Waldo P. Johnson (1862), id.; Trusten Polk (1862), id. at 31. There is some question whether Senators Davis, Brown, Mallory, Yulee, Clay, Fitzpatrick, Toombs and Benjamin were technically expelled. See id. at 27.

In 1877 the Senate annulled the expulsion of William K. Sebastian. 2 Hinds, supra note 20, § 1243.

51. See note 37 supra.

52. Senate Cases, supra note 36, at 30 n.8.

53. An eleventh Senator, John H. Mitchell of Oregon, was accused of conspiracy to defraud the United States and accepting bribes (1905) but died before the Senate could act. 2 Hinds, supra note 20, § 1278; Getz, supra note 2, at 88.

54. John Smith (1807), Senate Cases, supra note 36, at 4; Lazarus W. Powell (1862), id. at 31; Benjamin Stark (1862), id. at 34; Robert M. La Follette (1917), id. at 110.

The resolution to expel Senator Smith was narrowly defeated and he subsequently resigned. The resolutions to expel Senators Powell and Stark were defeated. Senator La Follette was cleared of all charges and no expulsion vote was taken by the Senate.

55. James F. Simmons (1862), Senate Cases, supra note 36, at 32; James W. Patterson (1873), id. at 52-54; Charles H. Dietrich (1904), id. at 98; Joseph R. Burton (1906), id. at 99; Burton K. Wheeler (1924), id. at 113. In the case of Simmons, the Senate committee which investigated the charges recommended expulsion but Simmons had resigned his seat before the next session of the Senate began. As for Patterson, he was defeated for reelection

archy that countenanced and encouraged polygamy and united church and state contrary to the spirit of the constitution . . . ."[56]

2. House of Representatives

In contrast to the Senate, the House of Representatives has used the power of expulsion rarely. Only three members have been expelled—all on the ground of treason.[57] Various House investigating committees have often recommended expulsion of a member only to have the full House vote censure instead.[58] In these situations, however, the offenses alleged did involve official, rather than private misconduct—namely, bribery or the sale of appointments to military academies.[59]

A word must be said about a number of cases in which a house of Congress has, in effect, "expelled" a seated member by a majority vote, rather than by a two-thirds vote. When a question arises about a member's valid election or eligibility for office, even after his seating, Congress has traditionally treated such a question as one of exclusion rather than one of expulsion. Thus, by a vote of 14 to 12, and after he had sat in Congress for one year, Albert Gallatin's election to the Senate was declared void because he had not been a citizen for nine years as required by the Constitution.[60] Similarly, the House of Representatives found that William Vandever was not entitled to his seat because he had accepted an office incompatible with his position in the House.[61] Although analogous in certain respects to cases of expulsion, these cases are properly treated as exclusions because they involve questions of eligibility for office, which is the focus of Congress' power to exclude.

II. Exclusion

Article I, section 5, clause 1 of the Constitution provides: "Each House shall be the judge of the elections, returns and qualifications of its own

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before the Senate could consider the committee report recommending expulsion. Senator Burton resigned before the Senate committee filed a report. Both Senators Dietrich and Wheeler were cleared of the charges brought against them.

56. Senate Cases, supra note 36, at 97-98.

57. They were: John W. Reid and John B. Clark, both of Missouri, and Henry C. Burnett of Kentucky (1861). 2 Hinds, supra note 20, §§ 1261-62. John B. Clark had never taken his seat, however, and was technically excluded by a two-thirds vote rather than expelled.

58. Getz, supra note 2, at 85-87.

59. Id.

60. Senate Cases, supra note 36, at 1. For other instances of "exclusions" of seated Senators, see the cases of James Shields, id. at 14, James Harlan, id. at 21, and John P. Stockton, id. at 38.

61. (1863). 1 Hinds, supra note 20, § 504. It should be noted that the Speaker of the House overruled a point of order objecting to the exclusion resolution on the ground that expulsion was the proper penalty in the case of a seated member. For other cases of House "exclusions" of seated members, see id. §§ 486-87.

Members." Since it may judge the qualifications of its members and the regularity of their elections, Congress may obviously exclude someone not properly elected or not having the requisite qualifications of membership.

Exclusion differs from expulsion in two important procedural respects. First, a prospective member must be excluded, while a member who has taken his seat must be expelled.[62] Second, a prospective member may be excluded by a simple majority, while a seated member must be expelled by a two-thirds vote. Exclusion and expulsion, then, "are not fungible proceedings."[63] As with expulsion, however, there are definite limitations, both procedural and substantive, on Congress' power to exclude.

A. *Procedural Restraints*

Although a member under threat of expulsion may have a more established right to participate in proceedings brought against him, a prospective member should be given the same procedural rights in an exclusion proceeding.[64] The people's right to be represented by whomever they choose should not be treated cavalierly. Before excluding a prospective member, Congress should afford him not only the right to participate fully in the debate but also whatever procedural rights are needed to prepare a proper defense.

B. *Substantive Restraints*

Exclusion is not included in the list of disciplinary powers in Article I, section 5, clause 2 of the Constitution, but rather is implied in the election provision of clause 1. It is incidental "not to Congressional discipline but to the final authority of Congress over the process of its Members' elections."[65] The framers of the Constitution provided for exclusion by a simple

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62. See text accompanying notes 60-61 supra.

63. Powell v. McCormack, 395 U.S. 486, 512 (1969).

64. See notes 18-21 supra and accompanying text. Brigham H. Roberts, who was excluded from the 56th Congress for polygamy, was permitted to speak in his own defense (1899). 1 Hinds, supra note 20, § 474. During the committee hearings on his exclusion, Adam Clayton Powell requested that he be given "(1) notice of the charges pending against him, including a bill of particulars as to any accuser; (2) the opportunity to confront any accuser, to attend all committee sessions where evidence was given, and the right to cross-examine all witnesses; (3) public hearings; (4) the right to have the Select Committee issue its process to summon witnesses for his defense; (5) and a transcript of every hearing." The Committee stated that it had given Powell notice of the matters it would investigate, that he and his counsel could attend all hearings and that the committee would call witnesses on Powell's written request and supply a transcript. Hearings on H.R. Res. 1 Before the Select Committee Pursuant to H.R. Res. 1, 90th Cong., 1st Sess. 54-59 (1967). See also Note, The Power of a House of Congress to Judge the Qualifications of Its Members, 81 Harv. L. Rev. 673, 675 n.13 (1968).

65. Congress and the Public Trust, supra note 8, at 204.

majority vote,[66] an indication that they considered exclusion a relatively limited power, with limited potential for abuse and political factionalism.[67] The grounds for exclusion specified in the Constitution relate to a member's eligibility for office, and to the validity of his election, rather than to his personal conduct. Congress, however, has not always respected the constitutional limits on its power to exclude.

1. Grounds for Exclusion

Article I of the Constitution mentions three standing qualifications for membership in Congress: age, citizenship and residency. Section 3 of that article provides that "[n]o person shall be a Senator who shall not have attained to the age of thirty years, and been nine years a citizen of the United States, and who shall not, when elected, be an inhabitant of that State for which he shall be chosen." As for the House of Representatives, Article I, section 2 provides: "No person shall be a Representative who shall not have attained to the age of twenty-five years, and been seven years a Citizen of the United States, and who shall not, when elected, be an inhabitant of that State in which he shall be chosen." A fourth constitutional requirement, as noted by the Supreme Court in *Roudebush v. Hartke*[68] is that the member be elected.[69]

In addition to the *qualifications* for Congressional membership listed in the Constitution, it has been argued that the Constitution also lists certain *disqualifications* for membership.[70] Thus, a person is disqualified from membership in Congress if he has been impeached,[71] if he holds any other office under the United States,[72] if he was elected by a state not having a republican form of government,[73] if he refuses to take an oath or affirmation to support the Constitution,[74] or if after taking such an oath to support

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66. Prior to 1787, English and colonial antecedents support the conclusion that both expulsion and exclusion could be effected by a majority vote. See Powell v. McCormack, 395 U.S. 486, 536 (1969).

67. See the remarks of James Madison in the text accompanying note 28 supra.

68. 405 U.S. 15 (1972).

69. Id. at n.23. The Supreme Court cites the seventeenth amendment as the source of this requirement for membership in the Senate. The same qualification for House membership could be inferred from article I, section 2, clause 1 of the Constitution.

There seems to be some authority that mental capacity may be implied as a fifth qualification. See 1 Hinds, supra note 20, § 441, (Senate investigation of the sanity of a Senator-elect).

70. Dionisopoulos, A Commentary on the Constitutional Issues in the Powell and Related Cases, 17 J. Pub. L. 103, 111-15 (1968), [hereinafter cited as Dionisopoulos].

71. U.S. Const. art. I, § 3.

72. Id. art. I, § 6.

73. See Luther v. Borden, 48 U.S. (7 How.) 1, 42 (1849).

74. U.S. Const. art. VI.

the Constitution, he engages in insurrection or rebellion or gives aid and comfort to the enemy.[75] Although in *Powell*, the Supreme Court refused to rule whether any or all of these disqualifications were in fact negative requirements for membership,[76] there seems to be ample textual evidence to conclude that they were intended to be.[77] Congress has in the past relied on these "disqualifications" in excluding a member-elect. Thus, Representative Vandever was excluded because he accepted another office under the United States;[78] Victor Berger was held not qualified to take his seat in the House of Representatives because he allegedly gave aid and comfort to the enemy after having taken an oath to support the Constitution;[79] and William Fishback and Elisha Baxter of Arkansas were denied Senate seats because at the time no republican government could be reestablished in Arkansas due to the continuation of armed hostilities.[80] Although there seems to have been no case where an elected Senator or Representative had been previously impeached or refused to take the oath to support the Constitution, the credentials of Senator Smoot of Utah were challenged because he allegedly had already taken a religious oath "of such a nature and character as that he is thereby disqualified from taking the oath of office required of a United States Senator."[81]

2. Exclusion Generally Does Not Involve Questions of Personal Misconduct

One difference between exclusion and expulsion is readily apparent: the grounds for exclusion should rarely cause a house of Congress to inquire into a prospective member's personal misconduct.[82] Either house of Congress would be hard put to justify a character investigation under the guise of determining proper age, citizenship or residency. Whether an elected

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75. Id. amend. XIV, § 3.

76. Powell v. McCormack, 395 U.S. 486, 520 n.41 (1969).

77. See Hobbs, supra note 16, at 147-48.

78. Vandever had become a colonel of the Ninth Regiment Iowa Volunteer Infantry. 1 Hinds, supra note 20, § 504. For a discussion of other instances where accepting other offices disqualified one from being a member of Congress, see Dionisopoulos, supra note 70, at 111-13.

79. (1919). Id. at 115.

80. (1864). Senate Cases, supra note 36, at 35.

81. (1903). Id. at 98.

82. Another difference might involve the evidence needed to prove each type of allegation. Generally, although by no means always, the relevant evidence needed in an exclusion proceeding will be documentary proof of age, citizenship and residency. In expulsion cases, the evidence required will usually be more elaborate, involving testimony of witnesses as in a courtroom. See 1 Hinds, supra note 20, §§ 424-25, for an instance where the House of Representatives permitted "parol evidence to prove the naturalization of a Member who could produce neither the record of the court nor his certificate of naturalization." Id. at § 424.

representative has been previously impeached, holds a second government job or refuses to take the oath of office are likewise questions requiring rather limited inquiry. Even Congress' little-used power to refuse admission to representatives of states not having a republican form of government could not reasonably support an investigation into personal misconduct of these representatives, but only into the governmental structure under which they were chosen. In all of these instances, exclusion is used to enforce the eligibility requirements listed in the Constitution but not to discipline a member-elect for personal misconduct.

There are two exceptions to this rule, however. In determining whether to exclude a member-elect who has not been properly elected or who has given aid and comfort to the enemy in contravention of his oath, Congress may have to judge personal misconduct. On several occasions, Congress, as supreme board of elections, has investigated suspected misconduct of a winning candidate.[83] In the cases of Frank L. Smith of Illinois and William S. Vare of Pennsylvania, the Senate went so far as to refuse them their seats because of the exorbitant amount of money spent in their campaigns.[84] Victor Berger was excluded because his pacifist activities allegedly gave aid and comfort to the enemy in contravention of his oath.[85] In these instances, the power to exclude was used as a disciplinary sanction. It should be noted, however, that these exceptions do have a narrow scope. For instance, in order to exclude a winning candidate for election improprieties, the exclusion must result from misconduct that directly affected the election, such as fraud or bribery.[86] It would be impermissible for Congress to inquire into a candidate's conduct not directly connected with the election.

3. Congress' Power to Require Qualifications for Membership in Addition to Those Listed in the Constitution

In *Powell v. McCormack* the Supreme Court clearly held that neither Congress nor any house thereof can establish qualifications in addition to those already contained in the Constitution.[87] The history of the debates at the Constitutional Convention gives some support to this interpretation. At the Convention, a committee report proposed that Congress should have

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83. See, e.g., Senate Cases, supra note 36, at 142-44.

84. (1926). Id. at 119-23.

85. (1919). See Dionisopoulos, supra note 70, at 115.

86. See Senate Cases, supra note 36, at 124. The Senate exonerated Arthur R. Gould of all charges of fraud and stated that "the transaction had no relation to his election to the Senate."

87. 395 U.S. 486, 550 (1969).

Similarly the states may not impose additional qualifications on Congressional eligibility, see 1 Hinds, supra note 20, §§ 413-17.

the power "to establish such uniform qualifications of the members of each House, with regard to property, as to the said Legislature shall seem expedient."[88] Gouverneur Morris moved to strike out the words "with regard to property," thus in effect permitting Congress to establish any qualifications it deemed expedient.[89] Madison objected, arguing that if Congress could establish qualifications, "it can by degrees subvert the Constitution . . . by limiting the number capable of being elected. . . . Qualifications founded on artificial distinctions may be devised by the stronger, in order to keep out partisans of a weaker faction."[90] When the issue came to a vote, Madison's position prevailed by a vote of seven states to four. Similarly, the Convention defeated the property qualification by a vote of seven states to three.[91]

In denying Congress the power to establish discretionary qualifications for members, the framers were following earlier state constitutional precedents. Although prior to 1787 state constitutions specified many qualifications for membership in the legislature (such as age, residence, religion, property, etc.) there is "no instance in which a State Legislature, having such a provision in its Constitution, undertook to exclude any member for lack of qualifications other than those required by such Constitution."[92]

Subsequent history also strengthens this conclusion. At least four constitutional amendments have been proposed which would add to the qualifications specified in the Constitution.[93] Clearly if Congress already had the power to set its own qualifications, there would be little reason to attempt to amend the Constitution.

In summary, although in certain limited situations exclusion serves a disciplinary function, exclusion is more an incident of Congress' power as supreme board of elections than of its power as guardian of congressional ethics.

C. *Exclusion Cases in the Senate and the House of Representatives*

Both houses of Congress, but particularly the House, have tended to view exclusion as a wider disciplinary power than a close study of the Constitutional provisions would warrant.

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88. Warren, supra note 28, at 418.
89. Id. at 420.
90. Id.
91. Id. at 421.
92. Id. at 423. For authority that Congress was given unlimited power to fix qualifications by the Constitution, see id. at 423-24 n.1.
93. Id. at 421 n.1. One was to make officers and stockholders of the Bank of the United States ineligible, three were to make government contractors ineligible.

1. Senate

As supreme board of the election of its members, the Senate has properly investigated the election conduct of various Senators-elect. For instance, in 1926, the Senate excluded two Senators-elect for exorbitant campaign expenditures[94] and, in 1946, investigated charges of racism in Theodore Bilbo's successful campaign to be elected Senator from Mississippi.[95]

In another context, the Senate by a majority vote in 1868 refused to permit Phillip F. Thomas of Maryland to take his seat because he had " 'voluntarily given aid, countenance, and encouragement to persons engaged in armed hostility to the United States.' "[96] Although there was no evidence of a prior oath, the language of the fourteenth amendment disqualifying one who gives aid and comfort to the enemy in contravention of his oath would probably permit this use of the exclusion power.

There was less justification, however, for the attempted exclusion of Senator William Langer of North Dakota in 1942.[97] By a vote of 13 to 3, the Senate Committee on Privileges and Elections voted to exclude Langer after hearings on charges of moral turpitude embracing kickbacks, acceptance of a bribe, and conversion of proceeds of legal settlements. The full Senate, however, rejected its committee's resolution to exclude. The Constitution does not permit a house to refuse to seat a member for these reasons. Even to allow a Senate committee to assume jurisdiction of such a case was improper.

2. House of Representatives

The House of Representatives' use of the exclusion power has generally been more questionable than the Senate's. Three examples will bear this out. In 1870 Representative B.F. Whitemore, who had resigned when censured by the House for selling appointments to a military academy, was excluded after his reelection in a special election.[98] Brigham Roberts was excluded in 1899 for polygamy,[99] and Adam Clayton Powell was excluded in 1967 for various offenses, including the misuse of public funds and the making of false reports on the expenditures of foreign currency to the Committee on House Administration.[100] In each of these cases, the House unconstitutionally excluded a member-elect for ethical reasons.

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94. See text accompanying note 84 supra.
95. Senate Cases, supra note 36, at 142-44. See also Getz, supra note 2, at 97.
96. Senate Cases, supra note 36, at 40.
97. Id. at 140-41.
98. 1 Hinds, supra note 20, § 464.
99. Id. §§ 474-80.
100. Powell v. McCormack, 395 U.S. 486, 492 (1969). The Powell case was unfortunately

III. Punishment

Article I, section 5, clause 2 of the Constitution provides: "Each House may . . . punish its Members for disorderly behavior . . . ." Of the three disciplinary powers available to Congress, the power to punish for disorderly behavior is the broadest in scope but the least drastic in effect.

A. *Types of Punishment*

Before proceeding with a discussion of the grounds for punishing a member, the types of permissible punishments should be catalogued.

1. Censure

By far the most common method of Congressional punishment is the censure. Although in form a mere resolution of the particular house reprimanding the member for his misconduct, the censure is not an innocuous sanction, having contributed to subsequent election defeats of various members.[101] In all, twenty-three members of Congress have been censured, fifteen in the House and eight in the Senate.[102]

2. Suspension

Unlike exclusion and expulsion, suspension entails only a temporary loss of floor privileges (including the right to vote) but not a member's seat itself.[103] The only recorded instance of an attempt by the Senate to suspend members occurred in 1902 when Senators McLaurin and Tillman were censured for fighting on the floor of the Senate.[104] Suspension poses some special problems which have undoubtedly limited its use. During the period of suspension, a member's constituents are deprived of the services of their representative without the power to send someone else in his place. Suspension then robs a segment of the population of its right to congressional representation.[105]

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clouded with charges of indiscretions in the Congressman's private life, and with countercharges of racism and discrimination.

101. For example, censure was a contributing factor in the election defeats of Senators Hiram Bingham (1932) and Thomas Dodd (1970).

102. See Getz, supra note 2, at 84-89.

103. See 2 Hinds, supra note 20, § 1665.

104. See id. Recently a House committee recommended that a member be stripped of his voting rights. See text accompanying note 2 supra.

105. The seriousness of suspension was emphasized by a statement made by a President Pro Tempore of the Senate: "The chair desires to say that on Monday last he requested the clerks not to call the names of the two Senators from South Carolina, they being by a resolution of the Senate in contempt of the body. On Tuesday he requested the clerks to read the names in the event there was a roll call. He did this not because he doubted in the least the

3. Imprisonment

It has been argued that "[t]raditional forms of punishment used in criminal law were probably within the contemplation of the framers when they used the term 'punish' . . . ."[106] Although imprisonment has never been used by Congress, the Supreme Court has remarked that in a proper case imprisonment of a member would be a permissible punishment.[107] Since certain activities of a Senator or Representative are insulated from the courts,[108] Congress should have the power to adjudicate and punish criminal violations in these protected areas. Of course, imprisonment of a member would prevent him from carrying out his duties to his constituents and raise problems similar to those discussed under suspension.

4. Fine

Prior to 1969, no member of either the House or the Senate had ever been fined or lost his salary. In the Powell imbroglio, however, the House imposed a $25,000 fine and ordered it paid by monthly salary deductions of $1,150.[109] The power to fine is a traditional penal sanction and reasonably inferable from the power to punish. It may be a particularly appropriate punishment where a member would not be affected by the more traditional vote of censure.

5. Loss of Seniority

The loss of seniority is a severe punishment for a Senator or a Representative. "[Seniority] is more than a means of choosing committee chairmen; it is a means of assigning members to committees, of choosing subcommittee chairmen and conference committee members. It affects the deference shown legislators on the floor, the assignment of office space, even invitations to dinners."[110] Two types of seniority, however, must be distinguished. There is general congressional seniority and party seniority. Only office assignments depend on congressional seniority; party seniority determines committee chairmanships and assignments.[111] Thus when Adam

propriety of the action he took on Monday. He did it because he recognized that it was a grave question, and he preferred to be in a position where, if it again arose, it could be by him submitted to the decision of the Senate and thus relieve the chair from the responsibility." Id.

106. Congress and the Public Trust, supra note 8, at 210.

107. Kilbourn v. Thompson, 103 U.S. 168, 189-90 (1880).

108. See note 9 supra.

109. Powell v. McCormack, 395 U.S. 486, 563 n.7 (1969).

110. G. Goodwin, Jr., The Seniority System in Congress, in Congressional Reform, Problems and Prospects 178-79 (J. Clark ed. 1965).

111. Congress and the Public Trust, supra note 8, at 207 (footnote). For example, House committee chairmen are chosen in the following manner. Rule 10 of

Clayton Powell was deprived of his seniority by the full House in 1969, what was taken away was his general House seniority.[112] His party seniority and the chairmanship of the House Education and Labor Committee had previously been taken from him by the House Democratic Caucus.[113] Thus, loss of seniority, while a most effective *party* sanction, is a relatively weak *congressional* sanction.

6. Adverse Publicity

Although not a formal punishment voted by the Senate or House, an investigation of a member's conduct is in itself something of a punishment.[114] The adverse publicity attendant upon such an investigation can seriously damage chances for reelection. Whether he had been ultimately censured or not, the mere investigations into Senator Thomas Dodd's conduct undoubtedly prejudiced his chances for reelection.

B. *Procedural Restraints*

1. Punishment as Compared to Expulsion and Exclusion

The critical difference between the power to punish and the power to expel or exclude lies in the very nature of the penalty. Expulsion or exclusion deprives a member of his seat in Congress, while punishment does not. Like exclusion, however, a simple majority may punish; but unlike exclusion, the Constitution does not specify, beyond the use of the term "disorderly behavior," the reasons for which these punishments may be

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the Standing Rules of the House states: "At the commencement of each Congress, the House shall elect as chairman of each standing committee one of the Members thereof . . . ." In actual fact, the House simply ratifies the decisions which have already been made by the Democrats or Republicans in their respective houses. The sole determining factor in that party determination is seniority. See J. Lindsay, The Seniority System, in House Republican Task Force on Congressional Reform and Minority Staffing, We Propose: A Modern Congress 23 (1966).

112. See H.R. Res. 2, 91st Cong., 1st Sess. (1969).

113. Congress and the Public Trust, supra note 8, at 206.

On January 2, 1965 the Democratic caucus of the House of Representatives had denied seniority rights to Representatives John B. Williams of Mississippi and Albert W. Watson of South Carolina "for having campaigned for Senator Barry M. Goldwater, the 1964 Republican candidate for the Presidency." Goodwin, supra note 110, at 180.

This article does not analyze the nature of party sanctions available to either the Democrats or Republicans in Congress. In addition to depriving a member of seniority in the Democratic or Republican ranks, a party could encourage a primary challenge to the member and limit his access to campaign funds distributed by party campaign committees.

114. Both the Senate and the House of Representatives have established their own ethics committees with power to investigate personal misconduct and recommend appropriate action to the full body. See note 22 supra.

imposed. In fact, the Constitution does not even mention the types or forms of punishment which may be employed by Congress.

2. Due Process Considerations

As with exclusion and expulsion, Congress should not mete out punishment, of whatever form, in an arbitrary fashion.[115] An argument can be made that from the point of view of a member's constituents, the grant of procedural rights in a punishment proceeding is at least as important as in an expulsion or exclusion proceeding. In these latter situations, if convicted, a member will be deprived of his seat, thereby giving his constituents an opportunity to choose a new representative. Punishment, however, will not cause the seat to be vacated, but will undoubtedly curtail a member's effectiveness in Congress and thereby his ability to represent his constituents.

C. *Substantive Restraints*

1. Grounds for Punishment: Prior Misconduct

Congress' reluctance to expel a member for prior misconduct has not prevented it from punishing a member for prior offenses,[116] presumably because punishment of a member for past offenses does not seriously invade the privilege of the people to elect their own representatives. It would seem, however, that Congress should punish a member for prior misconduct only if the offense would have been considered "disorderly behavior" at the time committed.

2. Disorderly Behavior

Article I, section 5 of the Constitution permits each house to punish its members for "disorderly behavior." If the framers of the Constitution left the term "disorderly behavior" purposely vague, both the Senate and House have begun to give it meaning in recently enacted codes of ethics.[117] Standing Rule XLIII of the House of Representatives requires, *inter alia*, that a member conduct himself at all times in a manner which shall reflect creditably on the House; to adhere to the spirit and letter of the rules of the House and its committees; to receive no compensation from

115. For John Quincy Adams' demand for the benefit of sixth amendment protection in a censure proceeding, see 2 Hinds, supra note 20, § 1255. For a description of what procedural rights might be warranted, see text accompanying notes 21-25 supra.

116. Getz, supra note 2, at 90. See 2 Hinds, supra note 20, § 1236; note 33 supra.

117. See the Senate and House Ethics Codes, cited in Congress and the Public Trust, supra note 8, appendix D. The impetus for the creation of the Codes of Ethics dates back to the Senate investigation of Robert Baker in 1964. The cases of Senator Thomas Dodd and Congressman Adam Clayton Powell gave additional urgency to the project. For a brief history of the creation of these Codes, see id. at 216-21.

any source, the receipt of which would occur by virtue of influence improperly exerted from his position in Congress; to accept no gift of substantial value from any person or organization having a direct interest in legislation before the Congress; to accept no honorarium for a speech, writing or other activity in excess of the usual and customary value for such services; and to keep his campaign funds separate from his personal funds.[118] The House Committee on Standards of Official Conduct is empowered to investigate alleged violations of this code "or of any law, rule, regulation, or other standard of conduct applicable to the conduct of [a] Member . . . in the performance of his duties or the discharge of his responsibilities . . . ."[119] After such investigation it may recommend appropriate action to the full House.

The Senate's Select Committee on Standards and Conduct is empowered to receive all "complaints and investigate allegations of improper conduct which may reflect upon the Senate, violations of law, and violations of rules and regulations of the Senate, relating to the conduct of individuals in the performance of their duties as Members of the Senate . . . ."[120] It may also recommend appropriate disciplinary action to the Senate as a whole.[121]

If these codes of ethics signal the beginning of a definition of "disorderly behavior," three things should be noted. First, the rules of both the House and Senate permit punishment of a member for conduct which might reflect badly on the particular house. In the Senate, it is called "improper conduct which may reflect upon the Senate."[122] In the House, it is called conduct which does not reflect creditably on the House of Representatives.[123] Second, each house may punish for violations of law but only if those violations occur *in the performance of a member's official duties.*[124] Presumably unlawful conduct which is not office-related is not punishable unless it may be considered conduct which tends to discredit a particular house. Third, while the House makes the violation of any of its rules punishable as a breach of its code of conduct,[125] the Senate seems to

118. Id. at 268.

119. Rule XI (19), id. at 271.

120. S. Res. 338 § 2(a), 88th Cong., 2d Sess., 110 Cong. Rec. 16939 (1964), cited in Congress and the Public Trust, supra note 8, at 266.

121. Id.

122. Id.

123. Rules of the House of Representatives, Rule XLIII(1), cited in Congress and the Public Trust, supra note 8, at 268.

124. See Congress and the Public Trust, supra note 8, at 228-30.

125. See Rules of the House of Representatives, Rule XI(19), cited in Congress and the Public Trust, supra note 8, at 271.

punish only violations of its rules which are office-related.[126] Realistically, however, it might be difficult for a Senator to argue that a viclation of a Senate rule was not by its very nature office-related. A study of the actual instances when Congress has punished a member shows that, while both houses have generally followed these guidelines, the Senate and House have on occasion used this power differently.

D. *Punishment Cases in the Senate and House of Representatives*

1. Senate

In the Senate, punishment for "disorderly behavior" has almost universally been for conduct which, while not unlawful, reflects badly on the Senate or violates its rules. In addition, the proscribed conduct has almost exclusively taken place in the Senate itself or in one of its committees. Thus in the eight cases of senatorial censure, four Senators were punished for fighting on the floor of the Senate,[127] one for revealing confidential information,[128] and one for placing a paid lobbyist on the staff of a subcommittee.[129] The last two Senators to be censured were Senators Joseph McCarthy in 1954, and Thomas Dodd in 1967.

Senator McCarthy was censured on two counts: (a) for his noncooperation with and abuse of the Subcommittee on Privileges and Elections of the Committee on Rules and Administration during a 1952 investigation of his conduct as a Senator and (b) for abuse of the Select Committee to Study Censure.[130] Senator Dodd was censured because his conduct was supposedly contrary to accepted morals, detracted "from the public trust expected of a Senator," and tended "to bring the Senate into dishonor and disrepute."[131] The censure resolution also alleged that he had "[exercised] the influence and power of his office . . . to obtain, and use for his personal benefit, funds from the public through political testimonials and a political campaign. . . ."[132] Dodd represents the only Senator censured for conduct which was not directly connected with the workings of the Senate.

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126. See S. Res. 338 § 2(a)(1), 88th Cong., 2d Sess., 110 Cong. Rec. 16939 (1964), cited in Congress and the Public Trust, supra note 8, at 266.

127. Thomas H. Benton of Missouri and Henry S. Foote of Mississippi (1850), Senate Cases, supra note 36, at 15-16; John L. McLaurin and Benjamin R. Tillman of South Carolina (1902), id. at 94-97.

128. Benjamin Tappan of Ohio (1844), id. at 11-13.

129. Hiram Bingham of Connecticut (1929), id. at 125-27.

130. Id. at 152-54.

131. Congress and the Public Trust, supra note 8, at 226.

132. Id. at 226-27.

2. House of Representatives

While the Senate censures for conduct which reflects discredit upon that body, the House has usually censured members for conduct which was both illegal and office-related. Of the fifteen instances of House censures, six cases have involved either bribery or the sale of appointments to military academies.[133] In all of these cases, the House committee investigating the facts voted or would have voted to expel; the full House chose rather to censure.[134] Two Representatives have also been censured for speaking allegedly treasonable words.[135] The House, however, has in some cases censured for conduct which tends to discredit it. These cases have generally involved the use of unparliamentary language;[136] one Representative, however, was censured for having placed an obscene letter in the Congressional Record.[137] As for types of punishment other than censure, the House has fined and stripped one of its members of seniority for allegedly misusing public funds.[138]

IV. Conclusion

From this analysis, it is clear that definite procedural and substantive rules do exist to guide Congress in the exercise of each of its disciplinary powers. Members are in no sense at the "unbridled discretion" of their colleagues. Congress has begun to show increased sensitivity towards criticism of the conduct of its members, and recent instances of alleged misconduct by certain members of Congress may result in Congress' disciplining members more frequently than in the past. Thus the limitations on Congress' power to expel, to exclude and to punish are likely to come under increased scrutiny.

133. See Getz, supra note 2, at 86 (Table I).
134. Id.
135. 2 Hinds, supra note 20, §§ 1253-54.
136. Id. §§ 1246-49, 1251.
137. Getz, supra note 2, at 85.
138. See text accompanying notes 109, 112 supra.

APPENDIX

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States* v. *Detroit Lumber Co.*, 200 U.S. 321, 337.

SUPREME COURT OF THE UNITED STATES

Syllabus

DOE ET AL. *v.* McMILLAN ET AL.

CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 71–6356. Argued December 13, 1972—Decided May 29, 1973

Petitioners, parents of District of Columbia (D. C.) school children, brought this action seeking damages and declaratory and injunctive relief for invasion of privacy that they claimed resulted from the dissemination of a congressional report on the D. C. school system that included identification of students in derogatory contexts. The named defendants included members of a House committee, Committee employees, a Committee investigator, and a consultant; the Public Printer and the Superintendent of Documents; and officials and employees connected with the school system. The Court of Appeals affirmed the District Court's dismissal of the complaint on the grounds that the first two categories of defendants were immune by reason of the Speech or Debate Clause, and that the D. C. officials and the legislative employees were protected by the official immunity doctrine recognized in *Barr* v. *Matteo*, 360 U. S. 564. *Held:*

1. The congressional committee members, members of their staff, the consultant, and the investigator are absolutely immune under the Speech or Debate Clause insofar as they engaged in the legislative acts of compiling the report, referring it to the House, or voting for its publication. Pp. 4–7.

2. The Clause does not afford absolute immunity from private suit to persons who, with authorization from Congress, perform the function, which is not part of the legislative process, of publicly distributing materials that allegedly infringe upon the rights of individuals. The Court of Appeals, therefore, erred in holding that respondents who (except for the Committee members and personnel) were charged with such public distribution were protected by the Clause. Pp. 7–10.

3. The Public Printer and the Superintendent of Documents are protected by the doctrine of official immunity enunciated in

Syllabus

Barr v. *Matteo, supra,* for publishing and distributing the report only to the extent that they served legitimate legislative functions in doing so, and the Court of Appeals erred in holding that their immunity extended beyond that limit. Pp. 10–17.

—— U. S. App. D. C. ——, 459 F. 2d 1304, reversed in part, affirmed in part, and remanded.

WHITE, J., delivered the opinion of the Court, in which DOUGLAS, BRENNAN, MARSHALL, and POWELL, JJ., joined. DOUGLAS, J., filed a concurring opinion, in which BRENNAN and MARSHALL, JJ., joined. BURGER, C. J., filed an opinion concurring in part and dissenting in part. BLACKMUN, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., joined. REHNQUIST, J., filed an opinion concurring in part and dissenting in part, in which BURGER, C. J., and BLACKMUN, J., joined, and in Part I of which STEWART, J., joined.

SUPREME COURT OF THE UNITED STATES

No. 71–6356

John Doe et al., Petitioners, *v.* John L. McMillan et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. JUSTICE WHITE delivered the opinion of the Court.

This case concerns the scope of congressional immunity under the Speech or Debate Clause of the United States Constitution, Art. I, § 6, cl. 1, as well as the reach of official immunity in the legislative context. See *Barr* v. *Matteo,* 360 U. S. 564 (1959); *Tenney* v. *Brandhove,* 341 U. S. 367 (1951).

By resolution adopted February 5, 1969, H. Res. No. 76, 91st Cong., 1st Sess., 115 Cong Rec. 2784, the House of Representatives authorized the Committee on the District of Columbia or its subcommittee "to conduct a full and complete investigation and study of . . . the organization, management, operation and administration" of any department or agency of the government of the District of Columbia or of any independent agency or instrumentality of government operating solely within the District of Columbia. The committee was given subpoena power and was directed to "report to the House as soon as practicable . . . the results of its investigation and study together with such recommendations as it deems advisable." On December 8, 1970, a Special Select Subcommittee of the Committee on the District of Columbia submitted to the Speaker of the House a

22-710 O - 73 - 10

report, H. R. Rep. No. 91–1681, 91st Cong., 2d Sess. (1970), represented to be a summary of the Subcommittee's investigation and hearings devoted to the public school system of the District of Columbia. On the same day, the report was referred to the Committee of the Whole House on the State of the Union and was ordered printed. 116 Cong. Rec. 40311 (1970). Thereafter, the report was printed and distributed by the Government Printing Office pursuant to 44 U. S. C. §§ 501 and 701.

The 450-page report included among its supporting data some 45 pages that are the gravamen of petitioners' suit. Included in the pertinent pages were copies of absence sheets, lists of absentees, copies of test papers, and documents relating to disciplinary problems of certain specifically-named students.[1] The report stated that these materials were included to "give a realistic view" of a troubled school and "the lack of administrative efforts to rectify the multitudinous problems there," to show the level of reading ability of seventh graders who were given a fifth-grade history test, and to illustrate suspension and disciplinary problems.[2]

On January 8, 1971, petitioners, under pseudonyms, brought an action in the United States District Court for the District of Columbia on behalf of themselves, their children, and all other children and parents similarly situated. The named defendants were (1) the Chair-

[1] The Court of Appeals' opinion terms the materials "somewhat derogatory." The absentee lists named students who were frequent "class cutters." Of the 29 test papers published in the report, 21 bore failing grades; all included the name of the student being tested. The letters, memoranda, and other documents relating to disciplinary problems detailed conduct of specifically named students. Some of the deviant conduct described involved sexual perversion and criminal violations.

[2] The information was obtained voluntarily from District of Columbia school personnel by Committee investigators.

man and members of the House Committee on the District of Columbia; (2) the Clerk, Staff Director, and Counsel of the Committee; (3) a consultant and an investigator for the Committee; (4) the Superintendent of Documents and the Public Printer; (5) the President and members of the Board of Education of the District of Columbia; (6) the Superintendent of Public Schools of the District of Columbia; (7) the principal of Jefferson High School and one of the teachers at that school; and (8) the United States of America.

Petitioners alleged that, by disclosing, disseminating, and publishing the information contained in the report, the defendants had violated the petitioners' and their children's statutory, constitutional, and common law rights to privacy and that such publication had caused and would cause grave damage to the children's mental and physical health and to their reputations, good names, and future careers. Petitioners also alleged various violations of local law. Petitioners further charged that "unless restrained, defendants will continue to distribute and publish information concerning plaintiffs, their children and other students." The complaint prayed for an order enjoining the defendants from further publication, dissemination, and distribution of any report containing the objectionable material and for an order recalling the reports to the extent practicable and deleting the objectionable material from the reports already in circulation. Petitioners also asked for compensatory and punitive damages.[3]

The District Court, after a hearing on motions for a temporary restraining order and for an order against

[3] The prayer also included a request for an injunction prohibiting future disclosure of "confidential information" and requiring the District of Columbia School Board "to establish rules and regulations regarding the confidentiality of school papers and the right of privacy of students in the schools of the District of Columbia."

further distribution of the report, dismissed the action against the individual defendants on the ground that the conduct complained of was absolutely privileged.[4] A divided panel of the United States Court of Appeals for the District of Columbia Circuit affirmed. Without determining whether the complaint stated a cause of action under the Constitution or any applicable law, the majority held that the Members of Congress, the Committee staff employees, and the Public Printer and Superintendent of Documents were immune from the liability asserted against them because of the Speech or Debate Clause and that the official immunity doctrine recognized in *Barr* v. *Matteo, supra,* barred any liability on the part of the District of Columbia officials as well as the legislative employees.[5] We granted certiorari, 408 U. S. 922.

I

To "prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," *Gravel* v. *United States,* 408 U. S. 606, 617 (1972), Art. I, § 6, cl. 1, of the Constitution provides that "for any Speech or Debate in either House, they [Members of Congress] shall not be questioned in any other Place."

> "The Speech or Debate Clause was designed to assure a co-equal branch of the government wide freedom of speech, debate, and deliberation without

[4] The District Court also dismissed the suit against the United States for failure to exhaust administrative remedies. 28 U. S. C. § 2675 (a). That ruling is not challenged here.

[5] The Court of Appeals also independently found that injunctive relief would not issue because of assurances from the federal defendants that no republication or further distribution of the Report was contemplated. With respect to petitioners' request for injunctive relief against the District of Columbia officials, the Court found that, because of the adoption of new policies concerning confidential information, "there is no substantial threat of future injury to appellants."

> intimidation or threats from the Executive Branch. It thus protects Members against prosecutions that directly impinge upon or threaten the legislative process." *Gravel* v. *United States, supra,* at 616.[6]

The Speech or Debate Clause has been read "broadly to effectuate its purposes," *United States* v. *Johnson,* 383 U. S. 169, 180 (1966); *Gravel* v. *United States, supra,* at 624, and includes within its protections anything "generally done in a session of the House by one of its members in relation to the business before it." *Kilbourn* v. *Thompson,* 103 U. S. 168, 204 (1880); *United States* v. *Johnson, supra,* at 179; *Gravel* v. *United States, supra,* at 624; *Powell* v. *McCormack,* 395 U. S. 486, 502 (1969); *United States* v. *Brewster,* 408 U. S. 501, 509, 512–513 (1972). Thus "voting by Members and committee reports are protected" and "a Member's conduct at legislative committee hearings, although subject to judicial review in various circumstances, as is legislation itself, may not be made the basis for a civil or criminal judgment against a Member because that conduct is within the 'sphere of legitimate legislative activity.'" *Gravel* v. *United States, supra,* at 624.

Without belaboring the matter further. it is plain to us that the complaint in this case was barred by the Speech or Debate Clause insofar as it sought relief from the Congressmen-Committee members, from the committee staff, from the consultant, or from the investigator, for introducing material at committee hearings that

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[6] "Our speech or debate privilege was designed to preserve legislative independence, not supremacy. Our task, therefore, is to apply the Clause in such a way as to insure the independence of the legislature without altering the historic balance of the three co-equal branches of Government." *United States* v. *Brewster,* 408 U. S. 501, 508 (1972).

identified particular individuals, for referring the Report that included the material to the Speaker of the House, and for voting for publication of the report. Doubtless, also, a published report may, without losing Speech or Debate Clause protection, be distributed to and used for legislative purposes by Members of Congress, congressional committees, and institutional or individual legislative functionaries. At least in these respects, the actions upon which petitioners sought to predicate liability were "legislative acts," *Gravel* v. *United States, supra,* at 618, and, as such, were immune from suit.[7]

Petitioners argue that including in the record of the hearings and in the Report itself materials describing particular conduct on the part of identified children was actionable because unnecessary and irrelevant to any legislative purpose. Cases in this Court, however, from *Kilbourn* to *Gravel* pretermit the imposition of liability on any such theory. Congressmen and their aides are immune from liability for their actions within the "legislative sphere," *Gravel* v. *United States, supra,* at 624–625, even though their conduct, if performed in other than legislative contexts, would in itself be unconstitutional or otherwise contrary to criminal or civil statutes. Although we might disagree with the Committee as to whether it was necessary, or even remotely useful, to include the names of individual children in the evidence submitted to the Committee and in the Committee Report, we have no authority to oversee the judgment of the Committee in this respect or to impose liability on them if we disagree with their legislative judgment. The acts of authorizing an investigation pursuant to

[7] In *Gravel,* we held that "the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself." *Gravel* v. *United States,* 408 U. S., at 618.

which the subject materials were gathered, holding hearings where the materials were presented, preparing a Report where they were reproduced, and authorizing the publication and distribution of that Report were all "integral part[s] of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation or with respect to other matters which the Constitution places within the jurisdiction of either House." *Id.*, at 625. As such, the acts were protected by the Speech or Debate Clause.

Our cases make perfectly apparent, however, that everything a Member of Congress may regularly do is not a legislative act within the protection of the Speech or Debate Clause. "[T]he Clause has not been extended beyond the legislative sphere," and "[l]egislative acts are not all-encompassing." *Id.*, at 624–625. Members of Congress may frequently be in touch with and seek to influence the Executive Branch of Government, but this conduct "though generally done, is not protected legislative activity." *Id.*, at 625; *United States* v. *Johnson, supra.* Nor does the Speech or Debate Clause protect a private republication of documents introduced and made public at a committee hearing, although the hearing was unquestionably part of the legislative process. *Gravel* v. *United States, supra.*

The proper scope of our inquiry, therefore, is whether the Speech or Debate Clause affords absolute immunity from private suit to persons who, with authorization from Congress, distribute materials which allegedly infringe upon the rights of individuals. The respondent insists that such public distributions are protected, that the Clause immunizes not only publication for the information and use of Members in the performance of their

legislative duties but also must be held to protect "publications to the public through the facilities of Congress." Public dissemination, it is argued, will serve "the important legislative function of informing the public concerning matters pending before Congress . . . ." Brief for Legislative Respondents, p. 27.

We do not doubt the importance of informing the public about the business of Congress. However, the question remains whether the act of doing so, simply because authorized by Congress, must always be considered "an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings" with respect to legislative or other matters before the House. *Gravel* v. *United States, supra,* at 625. A Member of Congress may not with impunity publish a libel from the speaker's stand in his home district, and clearly the Speech or Debate Clause would not protect such an act even though the libel was read from an official committee report.[8] The reason is that republishing a libel under such circumstances is not an essential part of the legislative process and is not part of that deliberative process "by which members participate in committee and House proceedings." *Gravel* v. *United States, supra,* at 625. By the same token, others, such as the Superintendent of Documents or the Public Printer or legislative personnel, who participate in distributions of actionable material beyond the reasonable bounds of the legislative task, enjoy no Speech or Debate Clause immunity.

Members of Congress are themselves immune for ordering or voting for a publication going beyond the reason-

[8] The republication of a libel, in circumstances where the initial publication is privileged, is generally unprotected. See generally Harper & James, The Law of Torts, § 5.18 (1956); Prosser, Torts, 766–769 (4th ed. 1971). See also *Gravel* v. *United States,* 408 U. S., at 622–627.

able requirements of the legislative function, *Kilbourn* v. *Thompson, supra,* but the Speech or Debate Clause no more insulates legislative functionaries carrying out such nonlegislative directives than it protected the sergeant-at-arms in *Kilbourn* v. *Thompson* when, at the direction of the House, he made an arrest that the courts subsequently found to be "without authority." *Id.,* at 200.[9] See also *Powell* v. *McCormack,* 395 U. S., at 504; cf. *Dombrowski* v. *Eastland,* 387 U. S. 82 (1967). The Clause does not protect "criminal conduct threatening the security of the person or property of others, whether performed at the direction of the Senator in preparation for or in execution of a legislative act or done without his knowledge or direction." *Gravel* v. *United States, supra,* at 622. Neither, we think, does it immunize those who publish and distribute otherwise actionable materials beyond the reasonable requirements of the legislative function.[10]

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[9] "In *Kilbourn*, the Speech or Debate Clause protected House Members who had adopted a resolution authorizing Kilbourn's arrest; that act was clearly legislative in nature. But the resolution was subject to judicial review insofar as its execution impinged on a citizen's rights as it did there. That the House could with impunity order an unconstitutional arrest afforded no protection for those who made the arrest." *Gravel* v. *United States,* 408 U. S., at 618.

[10] Although, as pointed out by my dissenting Brethren, the acts of Senator Gravel were not ordered or authorized by Congress or a congressional committee, *Gravel* v. *United States,* 408 U. S., at 626, the fact of congressional authorization for the questioned act is not sufficient to insulate the act from judicial scrutiny. In *Powell* v. *McCormack,* 395 U. S. 486 (1969), for instance, we reviewed the acts of House employees "acting pursuant to express orders of the House." *Id.,* at 504. We concluded that "although an action against a Congressman may be barred by the Speech or Debate Clause, legislative employees who participated in the unconstitutional activity are responsible for their acts." *Ibid.* See also *Kilbourn* v.

Thus we cannot accept the proposition that in order to perform its legislative function Congress not only must at times consider and use actionable material but also must be free to disseminate it to the public at large, no matter how injurious to private reputation that material might be. We cannot believe that the purpose of the Clause—"to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," *Gravel* v. *United States, supra,* at 617; *Powell* v. *McCormack, supra,* at 502; *United States* v. *Johnson, supra,* at 181—will suffer in the slightest if it is held that those who, at the direction of Congress or otherwise, distribute actionable material to the public at large have no automatic immunity under the Speech or Debate Clause but must respond to private suits to the extent that others must respond in light of the Constitution and applicable laws.[11] To hold otherwise would be to invite gratuitous injury to citizens for little if any public purpose. We are unwilling to sanction such a result, at least absent more substantial evidence that, in order to perform its legislative function, Congress must not only inform the public about the fundamentals of its business but also must distribute to the public generally materials otherwise actionable under local law.

Contrary to the suggestion of our dissenting Brethren, we cannot accept the proposition that our conclusion,

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Thompson, 103 U. S. 168 (1881); *Dombrowski* v. *Eastland,* 387 U. S. 82 (1967).

[11] We have no occasion in this case to decide whether or under what circumstances, the Speech or Debate Clause would afford immunity to distributors of allegedly actionable materials from grand jury questioning, criminal charges, or a suit by the executive to restrain distribution, where Congress has authorized the particular public distribution.

that general, public dissemination of materials otherwise actionable under local law is not protected by the Speech or Debate Clause, will seriously undermine the "informing function" of Congress. To the extent that the Committee report is printed and internally distributed to Members of Congress under the protection of the Speech or Debate Clause, the work of Congress is in no way inhibited. Moreover, the internal distribution is "public" in the sense that materials internally circulated, unless sheltered by specific congressional order, are available for inspection by the press and by the public. We only deal, in the present case, with general, public distribution beyond the halls of Congress and the establishments of its functionaries, and beyond the apparent needs of the "*due* functioning of the [legislative] process." *United States* v. *Brewster, supra,* at 516.

That the Speech or Debate Clause has finite limits is important for present purposes. The complaint before us alleges that the respondents caused the committee report "to be distributed to the public," that "distribution of the report continues to the present," and that "unless restrained, defendants will continue to distribute and publish" damaging information about petitioners and their children. It does not expressly appear from the complaint, nor is it contended in this Court, that either the Members of Congress or the Committee personnel did anything more than conduct the hearings, prepare the Report, and authorize its publication. As we have stated, such acts by those respondents are protected by the Speech or Debate Clause and may not serve as a predicate for a suit. The complaint was therefore properly dismissed as to these respondents. Other respondents, however, are alleged to have carried out a public distribution and to be ready to continue such dissemination.

In response to these latter allegations, the Court of Appeals, after receiving sufficient assurances from the respondents that they had no intention of seeking a republication or carrying out further distribution of the report, concluded that there was no basis for injunctive relief. But this left the question whether any part of the previous publication and public distribution by respondents other than the Members of Congress and Committee personnel went beyond the limits of the legislative immunity provided by the Speech or Debate Clause of the Constitution. Until that question was resolved, the complaint should not have been dismissed on threshold immunity grounds, unless the Court of Appeals was correct in ruling that the action against the other respondents was foreclosed by the doctrine of official immunity, a question to which we now turn.[12]

II

The official immunity doctrine, which "has in large part been of judicial making," *Barr* v. *Matteo*, 360 U. S. 564, 569 (1959), confers immunity on government officials of suitable rank for the reason that "officials of government should be free to exercise their duties unembarrassed by the fear of damage suits in respect of acts done in the course of those duties—suits which would consume time and energies which would otherwise be devoted to governmental service and the threat of which might appreciably inhibit the fearless, vigorous, and effec-

[12] While an inquiry such as is involved in the present case, because it involves two coordinate branches of Government, must necessarily have separation of powers implications, the separation of powers doctrine has not previously prevented this Court from reviewing the acts of Congress, see, *e. g.*, *Kilbourn* v. *Thompson*, *supra*; *Dombrowski* v. *Eastland*, *supra*, even when the Executive Branch is also involved, see, *e. g.*, *United States* v. *Brewster*, *supra*; *Gravel* v. *United States*, *supra*.

tive administration of policies of government." *Id.*, at 571.[13] The official immunity doctrine seeks to reconcile two important considerations—

> "[O]n the one hand, the protection of the individual citizens against pecuniary damage caused by oppressive or malicious action on the part of officials of the Federal Government; and on the other, the protection of the public interest by shielding responsible governmental officers against the harassment and inevitable hazards of vindictive or ill-founded damage suits brought on account of action taken in the exercise of their official responsibilities." *Id.*, at 565.

In the *Barr* case, the Court reaffirmed existing immunity law but made it clear that the immunity conferred might not be the same for all officials for all purposes. *Id.*, at 573; see also *Tenney* v. *Brandhove*, 341 U. S., at 378; *Dombrowski* v. *Eastland*, 387 U. S. 82, 85 (1967). Judges, like executive officers with discretionary functions, have been held absolutely immune regardless of their motive or good faith. *Barr* v. *Matteo, supra*, at 569; *Pierson* v. *Ray*, 386 U. S. 547, 553–555 (1967). But policemen and like officials apparently enjoy a more limited privilege. *Id.*, at 555–558. Also, the Court determined in *Barr* that the scope of immunity from defamation suits should be determined by the relation of the publication complained of to the duties entrusted to the officer. *Barr* v. *Matteo, supra*, at 573–574; see also the companion case, *Howard* v. *Lyons*, 360 U. S. 593, 597–598 (1959). The scope of immunity has always been tied to the "scope of authority." *Wheeldin* v. *Wheeler*, 373 U. S. 647, 651 (1963). In the legislative

[13] Both before and after *Barr*, official immunity has been held applicable to officials of the Legislative Branch. See *Tenney* v. *Brandhove*, 341 U. S. 367 (1951); *Dombrowski* v. *Eastland*, 387 U. S. 82 (1967).

context, for instance, "[t]his Court has not hesitated to sustain the rights of private individuals when it found Congress was acting outside its legislative role." *Tenney* v. *Brandhove, supra,* at 377. Thus, we have recognized "the immunity of legislators for acts within the legislative role," *Pierson* v. *Ray, supra,* at 554 (1967), but have carefully confined that immunity to protect only acts within "the sphere of legitimate legislative activity." *Tenney* v. *Brandhove, supra,* at 376; cf. *Powell* v. *McCormack, supra,* at 486.

Because the Court has not fashioned a fixed, invariable rule of immunity but has advised a discerning inquiry into whether the contributions of immunity to effective government in particular contexts outweighs the perhaps recurring harm to individual citizens, there is no ready-made answer as to whether the remaining federal respondents—the Public Printer and the Superintendent of Documents—should be accorded absolute immunity in this case. Of course, to the extent that they serve legislative functions, the performance of which would be immune conduct if done by congressmen, these officials enjoy the protection of the Speech or Debate Clause. Our inquiry here, however, is whether, if they participate in publication and distribution beyond the legislative sphere, and thus beyond the protection of the Speech or Debate Clause, they are nevertheless protected by the doctrine of official immunity. Our starting point is at least a minimum familiarity with their functions and duties.

The statutes of the United States create the office of Public Printer to manage and supervise the Government Printing Office, which, with certain exceptions, is the authorized printer for the various branches of the Federal Government. 44 U. S. C. § 301. "Printing and binding may be done at the Government Printing Office only when authorized by law." § 501. The Public Printer

is authorized to do printing for Congress, §§ 701–741, 901–910, as well as for the Executive and Judicial Branches of Government, §§ 1101–1123. The Public Printer is authorized to appoint the Superintendent of Documents with duties concerning the distribution and sale of documents. §§ 1701–1722.

Under the applicable statutes, when either House of Congress orders a document printed, the Printer is to print the "usual number" unless a greater number is ordered. § 701. The "usual number" is 1,682, to be divided between bound and unbound copies and distributed to named officers or offices of the House and Senate, to the Library of Congress, and to the Superintendent of Documents for further distribution "to the State libraries and designated depositories." *Ibid.*[14] There are also statutory provisions for the printing of extra copies, § 702, bills and resolutions, § 706–708, public and private laws, postal conventions, and treaties, §§ 709–712, journals, § 713, the Congressional Directory, § 721–722, memorial addresses, § 723–724, and the Statutes at Large, § 728–729. Section 733 provides that "[t]he Public Printer on order of a Member of Congress, on prepayment of costs, may reprint documents and reports of committees together with the evidence papers submitted, or any part ordered printed by the Congress."

With respect to printing for the Executive and Judicial Branches, it is provided that "[a] head of an executive department . . . may not cause to be printed, and the Public Printer may not print, a document or matter unless it is authorized by law and necessary to the public business." § 1102 (a). The executive departments and

[14] For the authorization to supply sufficient copies for such distribution see § 738. The Public Printer is also required to furnish the Department of State with 20 copies of all congressional documents and reports. 44 U. S. C. § 715.

the courts are to requisition printing by certifying that it is "necessary for the public service." § 1103.

The Superintendent of Documents has charge of the distribution of all public documents except those printed for use of the executive departments, "which shall be delivered to the departments," and for either House of Congress, "which shall be delivered to the Senate Service Department and House of Representatives Publications Distribution Service." § 1702. He is thus in charge of the public sale and distribution of documents. The Public Printer is instructed to "print additional copies of a Government publication, not confidential in character, required for sale to the public by the Superintendent of Documents," subject to regulation by the Joint Committee on Printing. § 1705.

It is apparent that under this statutory framework, the printing of documents and their general distribution to the public would be "within the outer perimeter" of the statutory duties of the Public Printer and the Superintendent of Documents. *Barr* v. *Mateo, supra,* at 575. Thus, if official immunity automatically attaches to any conduct expressly or impliedly authorized by law, the Court of Appeals correctly dismissed the complaint against these officials. This, however, is not the governing rule.

The duties of the Public Printer and his appointee, the Superintendent of Documents, are to print, handle, distribute, and sell government documents. The Government Printing Office acts as a service organization for the branches of the Government. What it prints is produced elsewhere and is printed and distributed at the direction of the Congress, the departments, the independent agencies and offices, or the Judicial Branch of the Government. The Public Printer and Superintendent of Documents exercise discretion only with respect to estimating the demand for particular documents and ad-

justing the supply accordingly. The existence of a Public Printer makes it unnecessary for every government agency and office to have a printer of its own. The Printing Office is independently created and manned and imbued with its own statutory duties; but, we do not think that its independent establishment carries with it an independent immunity. Rather, the Printing Office is immune from suit when it prints for an executive department for example, only to the extent that it would be if it were part of the department itself or, in other words, to the extent that the department head himself would be immune if he ran his own printing press and distributed his own documents. To hold otherwise would mean that an executive department could acquire immunity for non-immune materials merely by presenting the proper certificate to the Public Printer, who would then have the duty to print the material. Under such a holding, the department would have a seemingly foolproof method for manufacturing immunity for materials which the court would not otherwise hold immune if not sufficiently connected with the "official duties" of the department. *Howard* v. *Lyons,* 360 U. S., at 597.

Congress has conferred no express, statutory immunity on the Public Printer or the Superintendent of Documents. Congress has not provided that these officials should be immune for printing and distributing materials where those who author the materials would not be. We thus face no statutory or constitutional problems in interpreting this doctrine of "judicial making." *Barr* v. *Matteo,* 360 U. S., at 569. We do, however, write in the shadow of *Bd. of Regents of State Colleges* v. *Roth,* 408 U. S. 564 (1972), and *Wisconsin* v. *Constantineau,* 400 U. S. 433 (1971), where the Court advised caution "[w]here a person's good name, reputation, honor, or integrity is at stake because of what the government is doing to him . . . ." *Id.,* at 437. We conclude that, for

the purposes of the judicially fashioned doctrine of immunity, the Printer and the Superintendent of Documents are no more free from suit in the case before us than would be a legislative aide who made copies of the materials at issue and distributed them to the public at the direction of his superiors. See *Dombrowski* v. *Eastland,* 387 U. S. 82 (1967). The scope of inquiry becomes equivalent to the inquiry in the context of the Speech or Debate Clause, and the answer is the same. The business of Congress is to legislate; congressmen and aides are absolutely immune when they are legislating. But when they act outside the "sphere of legitimate legislative activity," *Tenney* v. *Brandhove,* 341 U. S., at 376, they enjoy no special immunity from local laws protecting the good name or the reputation of the ordinary citizen.

Because we think the Court of Appeals applied the immunities of the Speech or Debate Clause and of the doctrine of official immunity too broadly, we must reverse its judgment and remand the case for appropriate further proceedings.[15] We are unaware, from this record, of the extent of the publication and distribution of the Report which has taken place to date. Thus we have little basis for judging whether the legitimate legislative needs of Congress, and hence the limits of immunity, have been exceeded. These matters are for the lower courts in the first instance.

Of course, like the Court of Appeals, we indicate nothing as to whether petitioners have pleaded a good cause of action or whether respondents have other defenses,

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[15] With respect to the District of Columbia respondents, the Court of Appeals found that they were acting within the scope of their authority under applicable law and, as a result, were immune from suit. We do not disturb the judgment of the Court of Appeals in this respect.

constitutional or otherwise. We have dealt only with the threshold question of immunity.[16]

The judgment of the Court of Appeals is reversed in part and affirmed in part, and the case is remanded to the Court of Appeals for further proceedings consistent with this opinion.

So ordered.

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[16] We thus have no occasion to consider Art. I, § 5, cl. 3, which requires that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy . . ."; nor need we deal with publications of the Judicial Branch and the legal immunities that may be attached thereto.

SUPREME COURT OF THE UNITED STATES

No. 71–6356

John Doe et al., Petitioners, *v.* John L. McMillan et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. JUSTICE DOUGLAS, whom MR. JUSTICE BRENNAN and MR. JUSTICE MARSHALL join, concurring.

I agree with the Court that the issue tendered is justiciable, and that the complaint states a cause of action. Though I join the opinion of the Court, I amplify my own views as they touch on the merits.

I

Respondents, relying primarily on *Gravel* v. *United States,* 408 U. S. 606, urge that the Report, concededly part and parcel of the legislative process, is immune from the purview of the courts under the Speech or Debate Clause of Art. I, § 6, of the Constitution.[1] In *Gravel* we held that neither Senator Gravel nor his aides could be held accountable or questioned with respect to events occurring at the subcommittee hearing at which the Pentagon Papers were introduced into the public record. The immunity in that case attached to the Senator and his aides, and there is no intimation whatsoever that committee reports are sacrosanct from judicial scrutiny. In fact, the Court disclaimed any need to "address issues that may arise when Congress or either

[1] That Clause in relevant part provides:

". . . and for any Speech or Debate in either house, [Senators and Representatives] shall not be questioned in any other Place."

House, as distinguished from a single Member, orders the publication and/or public distribution of committee hearings, reports, or other materials." [2] *Id.*, at 626 n. 16.

"Legislative immunity does not, of course, bar all judicial review of legislative acts." *Powell* v. *McCormack*, 395 U. S. 486, 503. "The purpose of the protection afforded legislators is not to forestall judicial review of legislative action but to insure that legislators are not distracted from or hindered in the performance of their legislative tasks by being called into court to defend their actions." *Id.*, at 505. This has been clear since Chief Justice Marshall's seminal decision in *Marbury* v. *Madison*, 1 Cranch. 137. We always have recognized the "judicial power to determine the validity of legislative actions impinging on individual rights." *Gravel* v. *United States*, *supra*, at 620.

In *Kilbourn* v. *Thompson*, 103 U. S. 168, the Court's first decision to consider the Speech or Debate Clause, the Court held unconstitutional a resolution of the House ordering the arrest of Kilbourn for refusing to honor a subpoena of a House investigating committee, since the House had no power to punish for contempt. Although the Court barred a claim for false imprisonment against Members of the House, it nevertheless reached the merits of Kilbourn's claim and allowed an action against the House's Sergeant At Arms, who had executed the warrant for Kilbourn's arrest.

Dombrowski v. *Eastland*, 387 U. S. 82, involved suits for an injunction and for damages against a Senator who headed a subcommittee of the Senate Judiciary Committee and counsel to the subcommittee for wrongful and unlawful seizure of property in violation of the Fourth

[2] The Committee report was transmitted to the House by the Chairman of the Committee, was referred to the Calendar of the Committee of the Whole House on the State of the Union, and was ordered to be printed.

Amendment. We agreed that the complaint against the Senator must be dismissed because the record "does not contain evidence of his involvement in any activity that could result in liability." *Id.*, at 84. As respects counsel to the subcommittee we held, in reliance on *Tenney* v. *Brandhove,* 341 U. S. 367, that the immunity granted by the Speech or Debate Clause "is less absolute, although applicable, when applied to officers or employees of a legislative body, rather than to legislators themselves." 387 U. S., at 85. Accordingly, we remanded the case against counsel to the subcommittee for trial because there was "a sufficient factual dispute" to require a trial. Acts done in violation of the Fourth Amendment—like assaults with fists or clubs or guns—are outside the protective ambit of the Speech or Debate Clause; *certainly violations of the Fourth Amendment are not within the scope of a legitimate legislative purpose.*

A striking illustration of the same principle was stated in *Watkins* v. *United States,* 354 U. S. 178, 188: "The Bill of Rights is applicable to investigations as to all forms of governmental action. Witnesses cannot be compelled to give evidence against themselves. They cannot be subjected to unreasonable search and seizure. Nor can the First Amendment freedoms of speech, press, religion, or political belief and association be abridged." And see *Barenblatt* v. *United States,* 360 U. S. 109, 153, 166 (dissenting opinions). A witness subpoenaed to testify before a congressional committee may not be forced to reveal his beliefs. One's conscience and thoughts are matters of privacy as is the whole array of one's beliefs or values. And, as *Watkins* indicates, a witness refusing to so testify may not be punished for contempt. *Violations of the commands of the First Amendment are not within the scope of a legitimate legislative purpose.*

I cannot agree, then, that the question for us is "whether [public dissemination], simply because authorized by Congress, must always be considered 'an integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings' with respect to legislative or other matters before the House." A legislator's function in informing the public concerning matters before Congress or concerning the administration of Government is essential to maintaining our representative democracy. Unless we are to put blinders on our Congressmen and isolate them from their constituents, the informing function must be entitled to the same protection of the Speech or Debate Clause as those activities which relate directly and necessarily to the immediate function of legislating. See *Gravel* v. *United States, supra,* at 634–637 (DOUGLAS, J., dissenting), 649–662 (BRENNAN, J., dissenting). In my view the question to which we should direct our attention is whether the House Report infringes upon the constitutional rights of petitioners and therefore is subject to scrutiny by the federal courts.

II

The House authorized its District Committee "to conduct a full and complete investigation and study of . . . (1) the organization, management, operation and administration of any department or agency of the government of the District of Columbia; (2) the organization, management, operation and administration of any independent agency or instrumentality of government operating solely in the District of Columbia." [3]

It was pursuant to this investigation and study that the Report in effect brands certain named students as juve-

[3] H. Res. 76, 91st Cong., 1st Sess., 115 Cong. Rec. 2784.

nile delinquents. As stated by Judge Wright in his dissent below:

> "The material included in the Committee report is not, as the majority contends, merely 'somewhat derogatory.' One disciplinary letter, for example, alleges that a specifically named child was 'involved in the loss of fifty cents' and 'invited a male substitute to have sexual relations with her, gapping her legs open for enticement.' Similar letters accused named children of disrespect, profanity, vandalism, assault and theft. Of the 29 test papers published in the report, 21 bore failing grades. Yet appellants seek only to prohibit use of the children's names without their consent. They do not contest the propriety of the investigation generally, nor do they seek to enjoin the conclusions or text of the report. Indeed, they do not even challenge the right of Congress to examine and summarize the confidential material involved. They wish only to retain their anonymity." 459 F. 2d 1304, 1324.

We all should be painfully aware of the potentially devastating effects of congressional accusations. There are great stakes involved when officials condemn individuals by name. The age of technology has produced data banks into which all social security numbers go; and following those numbers go data in designated categories concerning the lives of members of our communities. Arrests go in, though many arrests are unconstitutional. Acts of juvenile delinquency are permanently recorded and they and other alleged misdeeds or indiscretions may be devastating to a person in later years when he has outgrown youthful indiscretions and is trying to launch a professional career or move into a position where steadfastness is required.

Congress, in naming the students without justification exceeded the "sphere of legitimate legislative activity." *Tenney* v. *Brandhove, supra,* at 376. There can be no question that the resolution authorizing the investigation and study expressed a legitimate legislative purpose. Nevertheless, neither the investigatory nor, indeed, the informing function of Congress authorizes any "congressional power to expose for the sake of exposure." *Watkins* v. *United States, supra,* at 200. To the contrary, there is simply "no general authority to expose the private affairs of individuals without justification in terms of the functions of the Congress." *Id.,* at 187. The names of specific students were totally irrelevant to the purposes of the study. The functions of the Committee would have been served equally well if the students had remained anonymous.

It is true, of course, that members of Congress may, even in a case such as this, retain their immunity under the Speech or Debate Clause. But in this case, both the Public Printer and the Superintendent of Documents, official agencies entrusted by Congress with printing responsibilities, are named as defendants. And in the context of this case, such defendants may be held responsible for their actions. See *Powell* v. *McCormack, supra; Dombrowski* v. *Eastland, supra; Kilbourn* v. *Thompson, supra.*

At the very least petitioners are entitled to injunctive relief. The scope of the injunction and against whom it should operate only can be determined upon remand after a full hearing on the facts. We cannot say whether there is a threat of future public distribution or whether it will be feasible for any person subject to the equitable powers of the court to excise the students' names from Reports previously distributed. With respect to damages—that is, whether respondents, including the mem-

bers of the District of Columbia government if a valid claim is stated against them, are protected by the doctrine of official immunity as set forth in the opinion for the Court—I agree that it is a matter for the lower courts in the first instance.

SUPREME COURT OF THE UNITED STATES

No. 71–6356

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[May 29, 1973]

MR. CHIEF JUSTICE BURGER, concurring in part and dissenting in part.

I cannot accept the proposition that the judiciary has power to carry on a continuing surveillance of what Congress may and may not publish by way of reports on inquiry into subjects plainly within the legislative powers conferred on Congress by the Constitution. The inquiries conducted by Congress here were within its broad legislative authority and the specific powers conferred by cl. 17, § 8, Art. I.

It seems extraordinary to me that we grant to the staff aides of Members of the Senate and the House an immunity that the Court today denies to a very senior functionary, the Public Printer. Historically and functionally the Printer is simply the extended arm of the Congress itself, charged by law with executing congressional commands.

Very recently, in *United States* v. *Brewster,* 408 U. S. 501, 516 (1972), we explicitly took note of the "conscious choice" made by the authors of the Constitution to give broad privileges and protection to Members of Congress for acts within the scope of their legislative function. As JUSTICES BLACKMUN and REHNQUIST have demonstrated so well, the acts here complained of were not outside the traditional legislative function of Congress. I join fully in the concurring and dissenting opinions of MR. JUSTICE BLACKMUN and MR. JUSTICE REHNQUIST, *post,* —.

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[May 29, 1973]

MR. JUSTICE BLACKMUN, with whom THE CHIEF JUSTICE joins, concurring in part and dissenting in part.

I join MR. JUSTICE REHNQUIST's opinion, *post*, ——, but add some comments of my own.

Each step in the legislative report process, from the gathering of information in the course of an officially authorized investigation to and including the official printing and official distribution of that information in the formal report, is legitimate legislative activity and is designed to fulfill a particular objective. More often than not, when a congressional committee prepares a report, it does so not only with the object of advising fellow Members of Congress as to the subject matter, but with the further objects (1) of advising the public of proposed legislative action, (2) of informing the public of the presence of problems and issues, (3) of receiving from the public, in return, constructive comments and suggestions, and (4) of enabling the public to evaluate the performance of their elected representatives in the Congress. The Court has recognized and specifically emphasized the importance, and the significant posture, of the committee report as an integral part of the legislative process when, repeatedly and clearly, it has afforded speech or debate coverage for a Member's writing, signing, or voting in favor of a committee report just as it has for a Member's speaking in formal debate on the

floor. *Gravel* v. *United States*, 408 U. S. 606, 617, 624 (1972); *Powell* v. *McCormack*, 395 U. S. 486, 502 (1969); *Kilbourn* v. *Thompson*, 103 U. S. 168, 204 (1881).[1] That protection is preserved by the Court in this case, *ante*, pp. 5–7, because the Court appreciates that Congress must possess uninhibited internal communication.

The Court previously has observed that Congress possesses the power "to inquire into and publicize corruption, maladministration or inefficiency in the agencies of the Government" because the public is "entitled to be informed concerning the workings of its government." *Watkins* v. *United States*, 354 U. S. 178, 200 and n. 33 (1957). Indeed, as to this kind of activity, Woodrow Wilson long ago observed, "The informing function of Congress should be preferred even to its legislative function."[2] The Speech or Debate Clause is an outgrowth

[1] We are to read the Speech or Debate Clause "broadly to effectuate its purposes." *United States* v. *Johnson*, 383 U. S. 169, 180 (1966); *Gravel* v. *United States*, 408 U. S. 606, 624 (1972). The "central role" of the Clause is "to prevent intimidation of legislators by the Executive and accountability before a possibly hostile judiciary," *Gravel* v. *United States*, *supra*, 408 U. S., at 617. The breadth of coverage of the Speech or Debate Clause must be no less extensive than the legislative process it is designed to protect, for the Clause insures for Congress "wide freedom of speech, debate, and deliberation without intimidation from the Executive Branch," *Gravel* v. *United States*, 408 U. S., at 616, or, I might suppose, from the judiciary.

[2] "It is the proper duty of a representative body to look diligently into every affair of government and to talk much about what it sees. It is meant to be the eyes and the voice, and to embody the wisdom and will of its constituents. Unless Congress have and use every means of acquainting itself with the acts and the disposition of the administrative agents of the government, the country must be helpless to learn how it is being served; and unless Congress both scrutinize these things and sift them by every form of discussion, the country must remain in embarrassing, crippling ignorance of the very affairs which it is most important that it should understand and direct. The informing function of Congress should be pre-

of the English doctrine that the courts should not be utilized as instruments to impede the efficient functioning of Parliament. *Kilbourn* v. *Thompson,* 103 U. S., at 201–205. Because the "informing function" is an essential attribute of an effective Legislative Branch, I feel the Court's curtailment of that function today violates the historical tradition signified textually by the Speech or Debate Clause and underlying our doctrine of separation of powers.

It may be that a congressional committee's activities and report are not protected absolutely by the Speech or Debate Clause. One may assume that there must be a legitimate legislative purpose in undertaking the investigation or hearing that culminates in the report. *Watkins* v. *United States,* 354 U. S., at 200; *Barenblatt* v. *United States,* 360 U. S. 109 (1959). I suggest, however, that the publication and distribution of a report compiled in connection with an officially authorized investigation is as much an "integral part of the deliberative and communicative processes by which Members participate in committee and House proceedings with respect to the consideration and passage or rejection of proposed legislation," *Gravel* v. *United States,* 408 U. S., at 625, as is the gathering of information or writing and voting for the publication of the report. In the case before us, there can be no question that the activities of the District of Columbia Committee of the House of Representatives were officially authorized and undertaken for a proper legislative purpose. Plenary jurisdiction over the District of Columbia is specifically vested

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ferred even to its legislative function. The argument is not only that discussed and interrogated administration is the only pure and efficient administration, but, more than that, that the only really self-governing people is that people which discusses and interrogates its administration," W. Wilson, Congressional Government, 303 (1895).

in Congress by Art. I, § 8, of the Constitution.[3] Matters such as the quality of education afforded by the District's schools, and the administrative problems they face, obviously are within the scope of the jurisdiction of the District Committee. In this case, it legitimately undertook its investigation of the administration of the school system.[4] At the conclusion of its investigation the Committee decided, as did the Committee of the Whole House on the State of the Union,[5] that, as a matter of legislative judgment, the report should be printed. It was stated that attachments to one portion thereof were included to "give a realistic view" of a troubled school "and the lack of administrative efforts to rectify the multitudinous problems there." [6] The report was printed and distributed by the Government Printing Office pursuant to 44 U. S. C. §§ 501 and 701.[7] This decision,

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[3] Article I, § 8:

"The Congress shall have Power . . .

. . . . . .

"To exercise exclusive Legislation in all Cases whatsoever, over such District (not exceeding ten Miles square) as may, by Cession of particular States, and the Acceptance of Congress, become the Seat of the Government of the United States. . . ."

[4] House Resolution 76, 91st Cong., 1st Sess., 115 Cong. Rec. 2784 (1969), authorized the Committee, "as a whole or by subcommittee . . . to conduct a full and complete investigation" of the "organization, management, operation, and administration of any department or agency," and of "any independent agency or instrumentality" of government in the District of Columbia.

[5] 116 Cong. Rec. 40311 (1970).

[6] H. R. Rep. No. 91–1681, 91st Cong., 2d Sess., 212 (1970).

[7] The Court notes, *ante*, p. 17, apparently in alleviation of its conclusion as to possible liability, that a specific statutory grant of immunity to the Public Printer and the Superintendent of Documents relieving them of personal liability for the distribution of an unprotected document has not been conferred. But it is not clear how, if liability otherwise exists, such a grant of immunity would shield these public servants in a case involving alleged constitutional

though reasonable men well may differ as to its wisdom, was a conscious exercise of legislative discretion constitutionally vested in the Legislative Branch and not subject to review by the judiciary. Indeed, as MR. JUSTICE REHNQUIST observes, *post,* p. 2, this Court has stated that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney* v. *Brandhove,* 341 U. S. 367, 377 (1951).

Although the Court in the present case holds that the gathering of information, the preparation of a report, and the voting on a resolution authorizing the printing of a committee report are protected activities under the Speech or Debate Clause, it renders that protection for Members of Congress and legislative personnel less than meaningful by further holding that the authorized public distribution of a committee document may be enjoined and those responsible for the distribution held liable when the document contains materials "otherwise actionable under local law." *Ante,* p. 10. The Court's holding thus imposes on Congress the onerous burden of justifying, apparently by "substantial evidence," *ibid.,* the inclusion of allegedly actionable material in committee documents.[8] This, unfortunately, ignores the realities

violations. Thus, the Court has placed the Public Printer and Superintendent of Documents in the untenable position either of accepting the risk of personal liability, whenever a congressional document officially is printed and distributed, or of violating the specific command of a congressional resolution ordering the printing and distribution.

[8] An interesting dilemma is presented by the possibility of an injunction against distribution where "otherwise actionable" material is printed in the Congressional Record. The Court recognizes the existence of this problem and reserves its resolution for another day. *Ante,* p. 19, n. 16. The Congressional Record, however, receives wide public distribution on a regular basis and it is not an uncommon occurrence for all or part of a committee report or other document to be read into the Record by a Member of Congress. In light of

of the "deliberative and communicative processes," *Gravel* v. *United States*, 408 U. S., at 625, by which legislative decisionmaking takes place.

Although it is regrettable that a person's reputation may be damaged by the necessities or the mistakes of the legislative process,[9] the very act of determining judicially whether there is "substantial evidence" to justify the inclusion of "actionable" information in a committee report is a censorship that violates the congressional free speech concept embodied in the Speech or Debate Clause[10] and is, as well, the imposition of this Court's judgment in matters textually committed to the discre-

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the Court's holding in this case, it is conceivable that, in lieu of separate publication as a committee document, a committee report containing possibly actionable material hereafter will be printed in the Record in order to effectuate public distribution. It appears to me almost beyond question that an injunction against the distribution of the Congressional Record is clearly precluded by the Speech or Debate Clause and by the Constitution's Art. I, § 5, cl. 3, providing that "Each House shall keep a Journal of its Proceedings, and from time to time publish the same, excepting such Parts as may in their Judgment require Secrecy."

[9] Only last Term, in *United States* v. *Brewster*, 408 U. S. 501, 516–517 (1972), the Court emphasized that

"In its narrowest scope, the [Speech or Debate] Clause is a very large, albeit essential, grant of privilege. It has enabled reckless men to slander and even destroy others with impunity, but that was the conscious choice of the Framers . . . . The authors of our Constitution were well aware of the history of both the need for the privilege and the abuses that could flow from too sweeping safeguards. In order to preserve other values, they wrote the privilege so that it tolerates and protects behavior on the part of Members not tolerated and protected when done by other citizens, but the shield does not extend beyond what is necessary to preserve the integrity of the legislative process."

[10] I do not reach the question whether the withholding of information from the public with respect to matters being considered by elected representatives in any way diminishes protected First Amendment values.

tion of the Legislative Branch by Art. I of the Constitution. I suspect that Chief Justice Marshall and his concurring Justices would be astonished to learn that the time-honored doctrine of judicial review they enunciated in *Marbury* v. *Madison,* 1 Cranch 137 (1803), has been utilized to foster the result reached by the Court today.[11]

Stationing the federal judiciary at the doors of the Houses of Congress for the purpose of sanitizing congressional documents in accord with this Court's concept of wise legislative decisionmaking policy appears to me to reveal a lack of confidence in our political processes and in the ability of Congress to police its own members. It is inevitable that occasionally, as perhaps in this case, there will be unwise and even harmful choices made by Congress in fulfilling its legislative responsibility. That, however, is the price we pay for representative government. I am firmly convinced that the abuses we countenance in our system are vastly outweighed by the demonstrated ability of the political process to correct overzealousness on the part of elected representatives.

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[11] "The premise that courts may refuse to enforce legislation they think unconstitutional does not support the conclusion that they may censor congressional language they think libelous. We have no more authority to prevent Congress, or a committee or public officer acting at the express direction of Congress, from publishing a document than to prevent them from publishing the Congressional Record. If it unfortunately happens that a document which Congress has ordered published contains statements that are erroneous and defamatory, and are made without allowing the persons affected an opportunity to be heard, this adds nothing to our authority. Only Congress can deal with such a problem." *Methodist Federation for Social Action* v. *Eastland,* 141 F. Supp. 729, 731–732 (DC 1956 (three-judge court)).

SUPREME COURT OF THE UNITED STATES

No. 71–6356

John Doe et al., Petitioners, *v.* John L. McMillan et al.	On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit.

[May 29, 1973]

MR. JUSTICE REHNQUIST, with whom THE CHIEF JUSTICE and MR. JUSTICE BLACKMUN join, and with whom MR. JUSTICE STEWART joins as to Part I, concurring in part and dissenting in part.

I concur in the Court's holding that the respondent Members of Congress and their committee aides and employees are immune under the Speech or Debate Clause for preparation of the Committee Report for distribution within the halls of Congress. I dissent from the Court's holding that Members of Congress might be held liable if they were in fact responsible for public dissemination of a committee report, and that therefore the Public Printer or the Superintendent of Documents might likewise be liable for such distribution. And quite apart from the immunity which I believe the Speech or Debate Clause confers upon congressionally authorized public distribution of committee reports, I believe that the principle of separation of powers absolutely prohibits any form of injunctive relief in the circumstances here presented.

I

In *Gravel* v. *United States,* 408 U. S. 606 (1972), we decided that the Speech or Debate Clause of the Constitution did not protect private republication of a committee report, but left open the question of whether publication and public distribution of such reports au-

thorized by Congress would be included within the privilege. 408 U. S., at 626 n. 16. While there are intimations in today's opinion that the privilege does not cover such authorized public distribution, the ultimate holding is apparently that the District Court must take evidence and determine for itself whether or not such publication in this case was within the "legitimate legislative needs of Congress," *ante,* at 18.

While there is no reason for a rigid, mechanical application of the Speech or Debate Clause, there would seem to be equally little reason for a completely *ad hoc,* factual determination in each case of public distribution as to whether that distribution served the "legitimate legislative needs of Congress." A supposed privilege against being held judicially accountable for an act is of virtually no use to the claimant of the privilege if it may only be sustained after elaborate judicial inquiry into the circumstances under which the act was performed. This disposition is particularly anomalous when viewed in light of our earlier views on the scope of the constitutional privilege to the effect that it is "not consonant with our scheme of government for a court to inquire into the motives of legislators." *Tenney* v. *Brandhove,* 341 U. S. 367, 377 (1951). A factual hearing in the District Court could scarcely avoid inquiry into legislative motivation.

Previous decisions of this Court have upheld the immunity of Members whenever they are "acting in sphere of legitimate legislative activity." *Tenney* v. *Brandhove, supra,* 341 U. S., at 376. In *Kilbourn* v. *Thompson,* 103 U. S. 168 (1880), we held that this immunity extends to everything "generally done in a session of the House by one of its members in relation to the business before it." 103 U. S., at 204. This relatively expansive interpretation of the scope of immunity has been consistently reaffirmed. *United States* v. *Johnson,* 383 U. S. 169, 179 (1966); *United States* v. *Brewster,* 408 U. S. 501, 509 (1972).

The subject matter of the Committee Report here in question was, as the Court notes, concededly within the legislative authority of Congress. Congress has jurisdiction over all matters within the District of Columbia, U. S. Const., Art. I, § 8, cl. 17, and the Committee was authorized by the full House to investigate the District's public school system. H. R. Res. 76, 91st Cong., 1st Sess., 115 Cong. Rec. 2784 (1969). And we have held that with respect to the preliminary inquiries, such as the findings here represent, concerning potential legislation, Congress' power "is as penetrating and far-reaching as the potential power to enact and appropriate under the Constitution." *Barenblatt* v. *United States,* 360 U. S. 109, 111 (1959).

In *Kilbourn* v. *Thompson, supra,* 103 U. S., at 204, *Powell* v. *McCormack,* 395 U. S. 486, 502 (1969), and *Gravel* v. *United States, supra,* 408 U. S., at 624, the Court has held that committee reports are absolutely privileged. In neither *Kilbourn* nor *Powell* was any distinction intimated between internal and public distribution of the reports. And while the question was reserved in *Gravel,* a comparison of the factual background surrounding Senator Gravel's reading into the committee record, the Pentagon Papers, and the limited publication apparently undertaken here, indicates that the difference in actual effect between the two is indeed minimal. The only difference between Senator Gravel's widely publicized reading, in the presence of numerous spectators and journalists, and the public distribution of this report, is that the former was confined within the legislative halls. But it can scarcely be doubted that information produced at a publicly attended committee hearing within the legislative halls may well as a practical matter receive every bit as much public circulation as information contained in a committee report which is itself publicly circulated.

To the extent that public participation in a relatively open legislative process is desirable, the Court's holding makes the materials bearing on that process less available than they might be. And the limitation thus judicially imposed is squarely contrary to the expressed intent of Congress. The Committee Report was ordered printed by the full House sitting as a Committee of the Whole. 116 Cong. Rec. H. 11347 (Dec. 8, 1970). It was thereafter printed and distributed by the Government Printing Office solely in accordance with statutory provisions. 44 U. S. C. §§ 501, 701 (1970). These provisions state specifically that the Public Printer may print only the number of copies designated by the Congress, such number, in the absence of contrary indication, being "the usual number" established by statute as 1,682. These copies may be distributed only "among those entitled to receive them." *Id.*, at § 701 (a). The distributees are specifically designated in the statute itself. *Id.*, at § 701 (c). Extra copies may be printed only by simple, concurrent, or joint resolution. *Id.*, at § 703. Thus every action taken by the Public Printer and the Superintendent of Documents, so far as this record indicates, was under the direction of Congress.

I agree with the Court that the Public Printer and the Superintendent of Documents have no "official immunity" under the authority of *Barr* v. *Matteo*, 360 U. S. 564 (1959). There is no immunity there when officials are simply carrying out the directives of officials in the other branches of government, rather than performing any discretionary function of their own. But for this very reason, if the body directing the publication or its Members would be immune from themselves publishing and distributing, the Printer and the Superintendent should be likewise immune. I do not understand the Court to hold otherwise. Because I would hold the Members immune had they undertaken the public distribution, I

would likewise hold the Superintendent and the Printer immune for having done so under the authority of the resolution and statute. The Court's contrary conclusion, perhaps influenced by the allegations of serious harm to the petitioners contained in their complaint, unduly restricts the privilege. The sustaining of any claim of privilege invariably forecloses further inquiry into a factual situation which, in the absence of privilege, might well have warranted judicial relief. The reason why the law has nonetheless established categories of privilege has never been better set forth than in the opinion of Judge Learned Hand in *Gregoire* v. *Biddle,* CA2, 177 F. 2d 579:

> "It does indeed go without saying that an official, who is in fact guilty of using his powers to vent his spleen upon others, or for any other personal motive not connected with the public good, should not escape liability for the injuries he may so cause; and, if it were possible in practice to confine such complaints to the guilty, it would be monstrous to deny recovery. The justification for doing so is that it is impossible to know whether the claim is well founded until the case has been tried, and that to submit all officials, the innocent as well as the guilty, to the burdens of a trial and to the inevitable danger of its outcome, would dampen the ardor of all but the most resolute, or the most irresponsible, in the unflinching discharge of their duties. Again and again the public interest calls for action which may turn out to be founded on a mistake, in the face of which an official may later find himself hard put to it to satisfy a jury of his good faith. There must indeed be means of punishing public officers who have been truant to their duties; but that is quite another matter from exposing such as have been honestly mistaken to suit by anyone who has suffered from their errors. As is so often the case, the

answer must be found in a balance between the evils inevitable in either alternative. In this instance it has been thought in the end better to leave unredressed the wrongs done by dishonest officers than to subject those who try to do their duty to the constant dread of retaliation."

II

Entirely apart from the immunity conferred by the Speech or Debate Clause on these respondents, I believe that the principle of separation of powers forbids the granting of injunctive relief by the District Court in a case such as this. We have jurisdiction to review the completed acts of the Legislative and Executive Branches. See, *e. g., Marbury* v. *Madison,* 1 Cranch 137 (1803); *Youngstown Sheet and Tool Co.* v. *Sawyer,* 343 U. S. 579 (1952); *Kilbourn* v. *Thompson, supra.* But the prospect of the District Court enjoining a committee of Congress, which, in the legislative scheme of things, is for all practical purposes Congress itself, from undertaking to publicly distribute one of its reports in the manner that Congress has by statute prescribed that it be distributed, is one that I believe would have boggled the minds of the Framers of the Constitution.

In *Mississippi* v. *Johnson,* 4 Wall. 475 (1886), an action was brought seeking to enjoin the President from executing a duly enacted statute on the ground that such executive action would be unconstitutional. The Court there expressed the view that I believe should control the availability of the injunctive relief here:

> "The Congress is the legislative department of the government, the President is the executive department. Neither can be restrained in its action by the judicial department; though the acts of both, when performed, are, in proper cases, subject to its cognizance." *Id.,* at 500.

In *Kilbourn* v. *Thompson, supra,* the Court reviewed the arrest and confinement of a private citizen by the Sergeant-at-Arms of the House of Representatives. In *Watkins* v. *United States,* 354 U. S. 178 (1957), the Court reviewed the scope of the investigatory powers of Congress when the executive had prosecuted a recalcitrant witness and sought a judicial forum for the purpose of imposing criminal sanctions on him. Neither of these cases comes close to having the mischievous possibilities of censorship being imposed by one branch of the Government upon the other as does this one.

In *New York Times* v. *United States,* 403 U. S. 713 (1971), this Court held that prior restraint comes before it bearing a heavy burden. *Id.,* at 714. Whatever may be the difference in the constitutional posture of the two situations, on the issue of injunctive relief, which is nothing if not a form of prior restraint, a Congressman should stand in no worse position in the federal courts than does a private publisher. Cf. *Hurd* v. *Hodge,* 334 U. S. 24, 34–35 (1948). Purely as a matter of regulating the exercise of federal equitable jurisdiction in the light of the principle of separation of powers, I would foreclose the availability of injunctive relief against these respondents.

Supplemental Questions Sent to Participants in the Roundtable Discussion by Chairman Metcalf

Congress of the United States,
Joint Committee on Congressional Operations,
Washington, D.C., August 1, 1973.

Dear ——: As I indicated in my letter to you of July 20th, 1973, I am enclosing additional questions on matters related to the committee's inquiry into legislative immunity, which time precluded our discussing at the roundtable meeting.

The completeness of the hearing record and, most importantly, the consideration by the committee of this issue in drafting our report and recommendations for the Congress will be facilitated by your discussion of the issues raised by these quaeres in as complete a manner as time and the remands of your personal schedule will permit.

I am not imposing any time schedule for your response, but the committee will, of course, appreciate a response at your earliest convenience. It is my intention to call a meeting of the committee for the purpose of initial discussion of our report and recommendations soon after the resumption of the congressional schedule in September.

Thank you for your interest and for your contribution to this inquiry by the committee.

Very truly yours,

Lee Metcalf.

Enclosure.

Questions for Panel of Witness-Experts on Legislative Immunity

immunity in civil and criminal proceedings

The Supreme Court in the *McMillan* case appears to have exercised jurisdiction over the content of an official publication of the Congress. The Court is telling the Congress what it can and cannot include in a report of a congressional committee, to whom that report can be made available, and by whom.

The bill introduced by Senator Ervin in this Congress—S. 1314—and Title II of S. 1726, introduced by Senator Gravel, are limited to the immunity from inquiry of Members of Congress in criminal proceedings regarding defined legislative activities. [Copies of the bills are attached.]

1. Doesn't it appear that the legislative process is much more seriously disrupted by a court-ordered embargo on a report of a congressional committee—some two and a half years after it had been ordered printed and distributed by the House of Representatives—than by having an individual legislator charged with a violation of a criminal statute for what may be a legislative act?

2. Article I, section 6, of the Constitution provides freedom from inquiry "in any other Place" to legislators for their legislative acts. Is that immunity limited to criminal proceedings?

3. In the case of a private civil action, where a constitutionally-protected right of an individual has been alleged to have been infringed, is there (a) absolute immunity for legislative activities; (b) no immunity; or (c) a necessity that the freedom of speech or debate be "balanced" against the competing constitutional claim of the individual?

4. If you are of the opinion that there is at least some immunity for legislators from civil proceedings, how would you define that immunity for purposes of legislation by the Congress?

5. Should a recommendation for congressional action to define legislative acts—for which Members of Congress and those who assist members in performing such acts shall be free from inquiry in judicial proceedings—(a) be limited to civil proceedings; (b) be limited to criminal procedures; or (c) combine both in defining legislative immunity?

What is your reason for your choice?

representation of congressional interests in court

In the *McMillan* case, the House District Committee was represented by the Justice Department, at the request of the committee, during the lower court proceedings. However, just as the case was moving up to the Supreme Court, the Justice Department withdrew because of the conflicting position it was taking on

Speech or Debate Clause immunity in the *Gravel* case. The Congress was represented in the Court by private counsel, with accompanying adverse publicity regarding costs involved and so forth.

Now, with the *McMillan* case on remand, the Congress finds itself in the position of having congressional interests once again represented by the Justice Department. The Government Printing Office defendants have requested such representation.

1. Shouldn't Congress give serious consideration to a better system of legal representation—particularly since it seems today that many legislative disputes—such as impoundment and war powers—are being settled in the courts?

2. What would you recommend to provide such representation?

3. Would you comment on the idea of a counsel for the Congress, similar to the proposal set out in Title III of Senator Gravel's bill, S. 1726?

4. [This quaere is addressed to Ms. Lawton.]

What defines the attorney-client relationship between the Department and the Congress in an instance where a Member of Congress, congressional committee or other congressional party to an action has requested representation by the Department?

Are there departmental regulations, rules or other writing pertaining to the representation of a congressional "client?" If so, are copies available to the committee? Would you comment on the nature of this rather unique attorney-client relationship?

Is it the case that the congressional client must accede to the judgment of the Department in the handling of his legal action; e.g., how are decisions regarding the case made?

THE SCOPE OF IMMUNITY FOR LEGISLATIVE ACTS

A question presented to the Supreme Court in the *Gravel* case was, in the words of the brief for the United States:

> Whether the Speech or Debate Clause of the Constitution (Art. I, Sec. 6) bars a grand jury from questioning aides of members of Congress and other persons about matters that may touch on activities of a member that are protected "Speech or Debate."

Justice White, writing for the Court's majority, answered this question with this response:

> We have little doubt that we are neither exceeding our judicial powers nor mistakenly construing the Constitution by holding that the Speech or Debate Clause applies not only to a Member but also to his aides insofar as the conduct of the latter would be a protected legislative act if performed by the Member himself. [*Gravel* v. *United States*, 408 U.S. 606, 618 (1972)]

This conclusion was said not to be foreclosed by the holdings in *Kilbourn* v. *Thompson* [103 U.S. 168 (1881)], *Dombrowski* v. *Eastland* [387 U.S. 82 (1967)], and *Powell* v. *McCormack* [395 U.S. 486 (1969)]. Justice White stated, in that regard, that—

> [n]one of these three cases adopted the simple proposition that immunity was unavailable to House or committee employees because they were not Representatives or Senators; rather, immunity was unavailable because they engaged in illegal conduct which was not entitled to Speech or Debate Clause protection. . . .
>
> None of this, as we see it, involves distinguishing between a Senator and his personal aides with respect to legislative immunity. In *Kilbourn*-type situations, both aide and Member should be immune with respect to committee and House action leading to the illegal resolution. So too in *Eastland*, as in this case, senatorial aides should enjoy immunity for helping a Member conduct committee hearings. On the other hand, no prior case has held that Members of Congress would be immune if they execute an invalid resolution by themselves carrying out an illegal arrest, or if, in order to secure information for a hearing, themselves seize the property or invade the privacy of a citizen. . . . [408 U.S. at 620–21]

1. Is it your opinion that this reasoning by Justice White would lead to the conclusion that had a Member of Congress performed the acts complained of in the *Kilbourn*, *Dombrowski* and *Powell* cases—acts performed by congressional employees under congressional direction—the Court would have held the Member to be liable for that action?

2. If Members of Congress and congressional employees themselves publicly distribute the report in controversy in *McMillan*, would they share liability with the Government Printing Office defendants for that distribution?

CONSTITUTIONAL AUTHORITY TO DEFINE LEGISLATIVE ACTS

1. Is it necessary to equate "legislative acts" with the "Speech or Debate" language in Article I, section 6, to broaden the scope of legislative immunity by legislation?

2. To what language in the Constitution is the grant of legislative powers in Article I, section 1, and the necessary and proper clause of section 8 tied to afford Congress the authority to legislatively define its own immunity?

CONGRESSIONAL RESPONSIBILITY UNDER ARTICLE I, SECTION 5

1. Any congressional action to define a realistic scope for legislative activities, for which legislators and those acting on their behalf are to be immune from judicial proceedings, carries with it the responsibility to keep our own houses in order. Do you think the disciplining of Members can be fairly and equitably performed by the individual houses of Congress?

2. Two of the recent Supreme Court decisions interpreting the Speech or Debate Clause involved allegations of bribes to Members of Congress. The opinions—in the *Johnson* and *Brewster* cases—reserved for future consideration the question of a delegation by the Congress, in specific and narrowly defined terms, of our Article I, section 5, authority of disciplining our Members.

Do you think, first, that such a delegation would be constitutional, and, if it is constitutional, is it wise?

Would you suggest changes or additions to the existing congressional mechanisms for discipline?

JURISDICTION OF THE COURTS

Finally, the committee would appreciate receiving your comments on the following propositions:

1. Whenever it appears to the Court that the matter in controversy involves the propriety of the exercise of legislative power by the Congress or any of its components the court must dismiss the action for want of jurisdiction because the judicial review of decisions or actions in the legislative process would be tantamount to judicial exercise of legislative power, *all* of which is vested in the Congress, none in the courts.

Note: This proposition is not in conflict with the *Marbury* v. *Madison* holding that a statute (the end-product of the legislative process) which conflicts with the Constitution is void to the extent of the conflict.

2. The rules and precedents of the House and Senate are internal legislative procedural matters, normally enforced by points of order, and may not in a subsequent court action form the basis for a review of the propriety of actions and decisions in the course of the legislative process. The courts must give full faith and credit to the final judgment of the Senate, the House of Representatives and the Congress.

3. There is no way to avoid a threshold, jurisdictional determination by the court that the subject matter of the controversy involves review of the exercise of legislative power.

RESPONSES OF MS. LAWTON TO SUPPLEMENTAL QUESTIONS[1]

DEPARTMENT OF JUSTICE,
Washington, D.C., August 17, 1973.

HON. LEE METCALF,
Chairman, Joint Committee on Congressional Operations, U.S. Senate, Washington, D.C.

DEAR SENATOR METCALF: Enclosed are my responses to the questions posed with your letter of August 1, 1973. As you will note, I have not felt free to respond to all of the questions raised. Unlike the distinguished professors, I participated in the panel as a representative of the Department of Justice, not

[1] None of the other participants in the roundtable discussion submitted responses to the supplemental questions.

as an independent "expert," and am therefore limited in my comments concerning pending cases in which the Department is involved, such as *Doe* v. *McMillan*. Nevertheless, I hope the attached is of some benefit to the Committee.

Respectfully,

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Enclosure.

IMMUNITY IN CIVIL AND CRIMINAL PROCEEDINGS

Before commenting on specific questions, it should be noted that the statement with respect to the holding in *Doe* v. *McMillan* is overly broad. The Court did not assert the power to censor official publications of the Congress. Indeed it held that no action would lie for official distribution of a report within the Congress. As to distribution outside the Congress the Court said that it had "little basis for judging whether the legitimate legislative needs of Congress, and hence the limits of immunity, have been exceeded." Accordingly it remanded this question to the court below.

1. While we are not aware of any court-ordered embargo on a report, it might be conceded that judicial action relating to the legislative function of the Congress has greater impact on the legislative institution than action which affects the personal conduct of an individual member. Of course, it must be noted that definitions of the "legislative function" vary.

2. Article I, section 6 does not distinguish between civil and criminal proceedings with respect to the "Speech or Debate Clause" although such a distinction is made with respect to arrest immunity. The distinction on which the cases rest is what is and is not a "legislative function" protected by the Clause.

3. The case law, to date, recognizes an absolute immunity of the legislator for legislative activities infringing the constitutional rights of individuals. *Kilbourn* v. *Thompson*, 103 U.S. 168 (1880) ; *Dombrowski* v. *Eastland*, 387 U.S. 82 (1967) ; cf. *Tenney* v. *Brandhove*, 341 U.S. 367 (1951). Aides, however, do not share this absolute immunity. There is language in *Gravel* v. *United States*, 408 U.S. 606, 618–622, however, that casts some doubt on both propositions.

4. Legislators are not immune from civil proceedings, they must still respond to such proceedings and claim privilege where applicable.

5. No recommendation.

REPRESENTATION OF CONGRESSIONAL INTERESTS IN COURT

1. Representation of the Congress has normally been undertaken by the Department of Justice except in cases where there is a direct conflict or a purely internal legislative matter. The question, however, appears to posit something more than the defense of Congress when it is sued. What is contemplated is unclear.

2. See 1 above.

3. Title III of S. 1726 contemplates not only the defense of Congress by separate counsel but also initiation of civil litigation by the Congress and "intervention" before Grand Juries. These present different problems.

Congress can and has sought independent representation to defend itself in litigation when the Department of Justice has declined representation. It is certainly arguable that this could be done on a permanent basis.

Initiation of civil suits by the Congress is quite a different matter. The execution of the laws is a matter committed by the Constitution to the Executive Branch and cannot be usurped by the legislative branch. *Springer* v. *Philippine Islands*, 277 U.S. 189, 202 (1928). Generally the decision whether or not to initiate litigation on behalf of the United States is viewed as a distinctly executive power. *Parker* v. *Kennedy*, 212 F. Supp. 594, 595 (S.D.N.Y. 1963). It is questionable that Congress could constitutionally assume this power. See *United States* v. *Cox*, 342 F. 2d 167 (C.A. 5, 1965), cert. denied 381 U.S. 935 (1965).

The concept of "intervention" before a grand jury is unheard of in American jurisprudence, either on behalf of the Congress or any private person. Even persons under investigation are not permitted counsel in the Grand Jury room. Rule 6(d), Fed. Rules Crim. Proc. It would violate all of our traditions and almost certainly the Constitution to permit a legislative body to appear as some form of "third party" before a Grand Jury.

Thus, the concept of counsel expressed in Title III of S. 1726 poses several serious constitutional problems as well as policy questions.

4. There is no "definition" of attorney-client relationship between the Department of Justice and any branch, agency or official that it represents. The statutes authorizing the Attorney General to conduct and supervise litigation, *e.g.* 28 U.S.C. 516–519, 547, constitute the basic authority for representation. In addition, 2 U.S.C. 118 authorizes representation of persons sued on account of anything done "while an officer of either House of Congress in the discharge of his official duty" if such representation is requested.

The practices of the Department with respect to representation of Congress, its members or its officers are described in some detail in a letter dated March 14, 1973 from Deputy Assistant Attorney General Jaffe (Civil Division) to Staff Counsel Raymond Gooch. These practices have not been formalized as rules or regulations nor are we aware of any general "writing" pertaining to the representation of congressional clients as a group. Individual case files may contain discussions of representation in particular fact situations.

The representation of Congress, like the representation of judges may pose conflict situations. For example, the Department will represent a federal judge, on request, in a mandamus case but not, of course, if the Department itself is seeking mandamus. Similarly, the Department will not represent the Congress or a congressman on request if there is a potential conflict. Such conflicts can also arise, of course, within the Executive Branch itself where agency views and interests may differ. Where the Department undertakes representation, the "attorney-client relationship" is similar whether the client be an executive agency, the Congress or a federal judge. The uniqueness that exists is in the nature of government representation itself—*e.g.* government may confess error where private counsel could not—not in the nature of the particular "client."

When the Department undertakes representation of a congressional client it insists on retaining control of the litigation and making the litigative decisions. Conflicts of opinion are normally resolved by discussion; if they are not in a given case, private counsel is recommended. The decisions are made by the appropriate litigating division in the same manner as in all other cases—decision by counsel handling the litigation in consultation with the "client," with review by supervisors where appropriate. Decisions as to appeals are made by the Solicitor General after discussion with the litigating division.

The Scope of Immunity for Legislative Acts

1. The situation posited is, of course, hypothetical and it would be inappropriate for a representative of the Department of Justice to suggest an answer. The time may come when the Department would be requested to represent a Member of Congress in such a situation and it would be undesirable to foreclose or prejudice argumentation by taking a position at this time.

2. Same comment as 1 above. It should also be noted that *McMillan* is still in litigation with the Department representing the Public Printer.

Constitutional Authority to Define Legislative Acts

1. The question appears to raise the issue whether the Speech or Debate Clause is the only possible source of legislative authority to enact immunity provisions relating to Congress. If this is the thrust then the answer must be that this is not the only source of legislative authority. Congress could, for example, place restrictions on the jurisdiction of the federal courts—particularly the lower federal courts—in such a manner as to foreclose particular actions against the Congress.

2. Unlike Article II which vests "The executive Power" and Article III which vests "The judicial Power," Article I contains a more limited agent—"All legislative Powers *herein* granted." On its face, "herein" might be read to refer only to Article I itself but it seems clear from reading the Constitution as a whole that "herein" means in this Constitution. Similarly, the Necessary and Proper Clause in Article I, section 8 would appear to apply to all of the powers vested in the Congress.

These powers could relate to the legislating of immunity in a number of ways. As mentioned above, jurisdiction of the federal courts could be circumscribed. Offenses such as bribery and conflict of interest could possibly be defined to ex-

clude members from liability. The authority to legislate for the District of Columbia might be utilized to exempt Members of Congress from all laws in the District, etc. As a technical matter, several variations could be used. The wisdom of using them is, of course, a separate matter.

CONGRESSIONAL RESPONSIBILITY UNDER ARTICLE I, SECTION 5

1. There are serious and possibly even overwhelming difficulties in self-disciplining by the Congress. As a political matter it would be extremely difficult for members to act against a colleague whose support they may need for some legislative matter. At the same time, it might be far too easy to abuse the discipline function with respect to the "maverick" member who, for example, continually criticizes the operations of the Congress.

Aside from political difficulties, members simply do not have the time to devote to a discipline system which would encompass the necessary investigation and hearing to assure fairness. Such proceedings can be extremely time-consuming. At present, Congress also lacks the staff necessary to conduct such investigations free from other duties.

2. As the Committee may be aware the question of delegating disciplinary authority over members of Congress was argued by the Department in the *Brewster* case. The arguments in support of such delegation are set forth in the government's brief. The wisdom of delegating is a matter on which we express no opinion.

JURISDICTION OF THE COURTS

1. While the general proposition stated is accurate in many, and perhaps most, instances of inquiry into the details of the legislative process, it is not universally true. In *Powell* v. *McCormack*, 395 U.S. 486, the Court held that it had jurisdiction to review the legislative act—exclusion—and pass on the merits even though the individual members could not be held liable. Similarly, the court would almost certainly review the legislative action in a contempt enforcement proceeding or a habeas corpus action based on summary contempt. Cf. *Kilbourn* v. *Thompson*, 103 U.S. 168. The immunity of the legislator is not an automatic bar to the review of the "propriety of the exercise of legislative powers."

2. Again the proposition is not universally true. For example, lack of committee jurisdiction under the standing rules may be raised and considered as a defense in a contempt of Congress prosecution. It might be noted, in addition, that the "full faith and credit" language of Article IV relates to State recognition of the acts of other States, not to judicial recognition of legislative precedents.

3. The statement is accurate inasmuch as the courts themselves must decide whether they have jurisdiction.

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